

# The CDEP Scheme and Racial Discrimination

## A Report by the Race Discrimination Commissioner, December 1997

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### Guide to Acronyms

APP	Average per Participant Rate
ATO	Australian Taxation Office
ATSIC	Aboriginal and Torres Strait Islander Commission
CDEP	Community Development Employment Projects
CERD	International Convention on the Elimination of All Forms of Racial Discrimination
DEETYA	Department of Employment, Education, Training and Youth Affairs
DSS	Department of Social Security
HCC	Health Care Concession Card
JSA	Job Start Allowance
LEAP	Landcare and Environment Action Program
NATSIS	1994 National Aboriginal and Torres Strait Islander Survey
NSA	New Start Allowance
RDA	<i>Racial Discrimination Act 1975</i>
PA	Parenting Allowance
PCC	Pensioner Concession Card
RA	Rent Allowance

### Foreword

In 1994, I was approached by a number of Aboriginal and Torres Strait Islander communities and organisations who expressed concern about the treatment of participants in the Community Development Employment Projects (CDEP) scheme. The main concern was that participants in the

CDEP scheme were not eligible for certain benefits and allowances received by other low income earners. Concern was expressed that this may amount to racial discrimination.

On 7 February 1995, the Human Rights and Equal Opportunity Commission (the Commission) authorised me to conduct an inquiry into the human rights issues raised by the CDEP scheme. The resolution of the Commission states:

By resolution of the Human Rights and Equal Opportunity Commission, made 7 February 1995 pursuant to Sub-section 19(2) of the Human Rights and Equal Opportunity Commission Act 1986, (the Act) the powers of the Commission under Sub-sections 11(1)(e), (j), (k) and (p) of the Act are hereby delegated to ZITA ANTONIOS, Race Discrimination Commissioner, for the purpose of examining legislation and policies relating to the Community Development Employment Scheme Project (CDEP) to determine whether the legislation or those policies have adverse discriminatory consequences that are contrary to the human rights of participants in the CDEP.<sup>1</sup>

Consultations were undertaken. A list of the submissions received is found at Appendix 1. A number of meetings were held with staff of the Department of Social Security and the Aboriginal and Torres Strait Islander Commission and draft copies of this report were supplied to the Department of Social Security and the Aboriginal and Torres Strait Islander Commission for comment. A draft copy was further distributed to the independent review of the CDEP scheme requested by the Expenditure Review Committee that commenced on 1 July 1997.

The CDEP scheme is not capable of neat categorisation. It has evolved in accordance with the unique circumstances of Australia's Indigenous communities and reflects the great diversity of Australia's Indigenous peoples. While the CDEP scheme is no longer limited to remote Indigenous communities, its history and current shape reflect many of the issues that confront Indigenous communities and government in seeking to provide services to remote Aboriginal and Torres Strait Islander communities.

This report does not attempt to provide a comprehensive assessment or evaluation of the CDEP scheme. The report seeks only to deal with the treatment of CDEP scheme participants in so far as their human rights may be breached. The report specifically attempts to appraise the treatment of CDEP participants as to whether any aspect of their treatment is racially discriminatory under federal human rights law.

The CDEP scheme presents a complex discrimination law problem. There are no easy answers. By setting out the relevant facts and legal principles it is hoped that human rights law can provide important standards and parameters to inform public policy and the approach of government in this area. This report aims to contribute to informed debate in this area and assist the development of equitable policies and procedures.

Dr Will Sanders, Centre for Aboriginal Economic Policy Research, Australian National University, acted as a consultant to the inquiry and provided much of the material on which this report is based. Ms Saku Akmeenmana, Mr Racho Donef and Ms Maria O'Sullivan also worked on the inquiry at various stages. Mr Stephen Bull drafted the final report. My thanks to them and to those who have contributed through our consultations.

One of the practical difficulties that confronted this inquiry was rapid change in the social security system. During the course of the inquiry a number of new benefits were introduced and others disappeared. Significantly, the Commonwealth Government announced and introduced a pilot Work

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<sup>1</sup> Minutes of the Human Rights and Equal Opportunity Commission, 1995/18, No. 17.

for the Dole scheme in October 1997. The material relating to benefits and entitlements is accurate as of 1 July 1997.

**Zita Antonios**  
**Race Discrimination Commissioner**

## **Major conclusions and recommendations**

### **The CDEP scheme and federal human rights law**

The CDEP scheme is designed to apply only to Aboriginal and Torres Strait Islander people. Accordingly, the scheme is race based.

The *Racial Discrimination Act 1975* (RDA) applies to the operation of CDEP schemes. The RDA does not apply to the legislative provisions that affect CDEP participants, for example, Section 614A of the Social Security Act and the provisions of the Income Tax Assessment Act that determine the eligibility of CDEP participants for various rebates.

The definition of racial discrimination requires that a race based measure is detrimental to the racial group in question. Additionally, racial discrimination law allows special measures and reasonable differentiation on the basis of race according to the concrete circumstances of a racial group.

The CDEP scheme does not appear to raise any significant issue of racial discrimination.

First, the CDEP scheme is designed to deal with disadvantage experienced by Indigenous communities in their access to social security and mainstream labour market programs and opportunities. The CDEP scheme further seeks to deal with the fact that many Indigenous communities have disadvantaged access to the social security system. The purpose of the CDEP scheme is to enhance the exercise, on an equal footing, of relevant economic, social and cultural rights of Indigenous peoples. The program is beneficial in nature and contains elements that could be described as a 'special measure' under the RDA.

Second, the program does not disadvantage non-Indigenous people.

Third, the program is adapted to the concrete circumstances of Indigenous communities. For example, the CDEP scheme assists in overcoming difficulties arising out of the remote location of many Indigenous communities.

Nevertheless, the Commission has some specific concerns with the administration of the CDEP scheme.

### **Absence of appeal rights**

There is an absence of defined appeal rights for CDEP communities and CDEP participants.

Social security recipients have access to a legislated system of merits review through the Social Security Appeals Tribunal. In comparison, there is no defined system of merits review available to CDEP communities and participants.

***Recommendation – review rights***

That the ATSIC implement a system of merits review for CDEP communities and participants as a matter of high priority.

**Disability discrimination**

Disability Support Pensioners are excluded from participating in their local CDEP scheme. Sole Parent Pensioners are not excluded. The relevant human right is the right not to be discriminated against on the basis of disability. The Disability Discrimination Act 1992 prohibits discrimination on the grounds of disability.

The Disability Discrimination Act does apply to the exclusion of Disability Support Pensioners as the exclusion is based on the administrative practice of the ATSIC and not legislation. The exclusion in its current form raises an issue as to whether it is consistent with the Disability Discrimination Act.

***Recommendation – disability discrimination***

That the ATSIC review the exclusion of Disability Support Pension recipients from CDEP schemes as a matter of high priority.

**Other areas of concern**

There are other identifiable areas of concerns where the human rights of CDEP participants may be compromised. These are:

- the absence of a guaranteed minimum income for CDEP participants; and
- lack of consistency in the treatment of CDEP participants by the Commonwealth Government.

These concerns are more problematic as they derive either from legislation or reflect legitimate policy objectives of the CDEP scheme.

For example, the lack of a minimum income for CDEP participants is balanced by the need to provide an incentive to work and the fact that CDEP participants can receive incomes much higher than New Start Allowance (NSA) recipients.

**The worst of all worlds**

The lack of consistency in the treatment of CDEP participants is an issue that is significant and requires urgent attention. In a number of situations, CDEP participants appear to experience the worst of all worlds in terms of their treatment by some Commonwealth bodies. For taxation purposes, CDEP income is assessable income and CDEP participants pay tax. If a CDEP participant earns a minimum income through a CDEP scheme, that individual is unable to access the NSA to ‘top-up’ his or her income as other low income wage earners can if they are seeking full-time work.

These difficulties are mainly due to the Department of Social Security’s (DSS) classification of the CDEP scheme as a ‘Commonwealth funded employment program’. It is questionable whether the classification of the CDEP scheme as an employment program by the DSS is entirely appropriate.

## Conclusion

The lack of uniformity in the administrative treatment of CDEP participants by Commonwealth Departments and agencies raises concern about discrimination and equality of treatment. Essentially, CDEP participants should be treated uniformly so as to avoid either the perception or possibility of discrimination.

The Government is urged to give consideration to treating CDEP participants as ordinary wage earners. This would require some amendment to Section 614A of the Social Security Act that denies CDEP participants access to the NSA due to their classification as recipients of a 'Commonwealth funded employment program'. If the legislative bar were removed, CDEP participants would not immediately gain access to the NSA or what is colloquially referred to as 'top-up'. CDEP participants would still have to satisfy all the other eligibility criteria of the NSA. It is noted that the ATSIC and the DSS are currently working closely together so as to address the income and equity issues arising out of the interaction between the CDEP scheme and the social security system.

### ***Recommendation***

That the Commonwealth Government treat CDEP participants uniformly as ordinary wage earners. Consideration should be given to the effect that section 614A of the Social Security Act has on CDEP participants.

## Chapter 1: Background

### Introduction

CDEP schemes provide an alternative to unemployment and social security benefits. The CDEP scheme allows Indigenous people to work on projects within their communities rather than passively receive social security benefits.

The development of the CDEP scheme is closely tied to the slow process of granting Indigenous people real access to the national social security system. This is part of the broader political and economic enfranchisement of Indigenous people that began with the 1967 referendum. This process continues today.

The CDEP scheme has a complex history and the scheme's current status is a product of this history.

### **Indigenous people and social security - a brief history**

For much of this century, the Commonwealth of Australia has been an innovator in the provision of social security benefits.<sup>2</sup> In 1908, national aged and invalid pension schemes were enacted and in 1912, maternity allowances. Before this some pension schemes operated in the States. One of the main qualifications to the progressive approach of the Commonwealth Government was the exclusion of Indigenous people from such schemes. One of the features of these early schemes was that 'Aboriginal Natives' were disqualified from all payments.<sup>3</sup>

There was significant growth in Australia's social security system as a result of the Great Depression although Indigenous people remained excluded from eligibility for any benefit. In 1941, a child

<sup>2</sup> See generally: Roe, J. (ed), *Social Policy in Australia: Some Perspectives 1901-1975*, Castille, Sydney, 1976.

<sup>3</sup> North Australia Development Unit, *Where to Now: The Department of Social Security Payments and the Aboriginal and Torres Strait Islander Communities in North Australia*, NACU research paper, Darwin, 1990, p. 12.

endowment payment was introduced. This was the first payment to which Indigenous people had access.<sup>4</sup> In 1942, 'Aboriginal Natives' became eligible for the, then, existing range of Commonwealth pensions. Significantly, the 1942 amendments excluded 'Aboriginal Natives' who were covered by the 'provisions of a state or territory law relating to the control of Aboriginal natives.'<sup>5</sup> There were also exclusions for Indigenous people who were deemed 'nomadic' or 'primitive'. The North Australian Development Unit, in its report *Where to Now* noted that despite the existence of entitlements:

In reality the Social Security Act continued to discriminate against Aborigines by adding amendments that restricted access to pensions and allowance payments and placing Aboriginal Australians under the control of non-Aboriginal administered Aboriginal departments, missions, settlements and pastoral properties.<sup>6</sup>

The policy of excluding Indigenous people from participation in Australia's social security system persisted until the late 1960s. This was despite the development after the Second World War of an otherwise comprehensive and universal system of social security in Australia.

In 1966, the Department of Social Services decided to remove all specific references to Aboriginal people from the Social Security Act including the provisions that disqualified 'Aboriginal Natives' who were nomadic or primitive.<sup>7</sup> Despite this, the exclusion concerning Indigenous people living on government and mission stations persisted until 1976.

In reality, Indigenous people living in remote communities continued to be excluded from participation in Australia's social security system well into the 1970s. For example, the 'work test' in relation to unemployment benefits was used effectively to exclude Indigenous people living in remote communities from access to social security benefits. Many Indigenous people were wards of the state or resident on missions. In such situations, Indigenous people were considered ineligible for unemployment benefits as they were considered to be in training or not looking for work. In the case of Indigenous people working on pastoral properties, the station managers were routinely reimbursed by the Department of Social Security<sup>8</sup> for their 'maintenance' as they were considered 'government dependants'<sup>9</sup> For many Indigenous people up until the mid-1970s, the only income support benefit available was the training allowance. Full, effective access to social security benefits did not occur until the late 1970s and in some remote communities not until the early 1980s. The community development employment project scheme

## **The community development employment project scheme**

The development of the CDEP scheme is closely related to the fact that in the mid-1970s Indigenous people in Northern Australia gained access to Australia's social security system.

In the 1973-74 Annual Report of the Department of Social Security it was noted:

Aborigines living on missions and settlements in the Northern Territory will now become entitled to unemployment benefits under normal eligibility rules. This follows the decision to phase out training allowances to Aborigines. To help obviate the problems caused by

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<sup>4</sup> As above, p. 13.

<sup>5</sup> North Australia Development Unit, *Where to Now: The Department of Social Security Payments and the Aboriginal and Torres Strait Islander Communities in North Australia*, NADU research paper, Darwin, 1990, p. 12.

<sup>6</sup> As above, p. 12.

<sup>7</sup> As above, p. 14.

<sup>8</sup> Renamed and restructured in 1972.

<sup>9</sup> North Australia Development Unit, *Where to Now: The Department of Social Security Payments and the Aboriginal and Torres Strait Islander Communities in North Australia*, NADU research paper, Darwin, 1990, p. 14.

the remoteness of the localities involved, a special procedure has been introduced for processing unemployment benefit payments. The procedure includes a four-weekly income statement. Five officers from the Department of Labour and Immigration are touring missions and settlements to liaise with community leaders and advisors to ensure that the new procedures are introduced with as little disruption as possible.<sup>10</sup>

Despite the existence of a legal entitlement there were numerous delivery problems and concerns about the social effect on Indigenous communities of cash incomes received as a result of social security.

On 23 March 1976, the then Ministers for Aboriginal Affairs, Social Security, Employment and Industrial Affairs met to discuss some of the difficulties arising because of Indigenous peoples' access to social security benefits. As a result an Interdepartmental Working Party on Aboriginal Employment was established. Additionally, during 1976 the Department of Aboriginal Affairs funded \$6.5 million of special works projects that provided employment through local government and communities for Indigenous people.

The Interdepartmental Working Group reported in July 1977. The Working Group found that at the end of February 1977, 12,218 Aboriginal people were registered as unemployed with the Commonwealth Employment Service. This figure represented approximately one third of the Aboriginal labour force and six times the unemployment rate for Australia as a whole. In the view of the Working Group, many Aboriginal people were unable to register for unemployment and it was estimated that the true percentage of the Aboriginal population unemployed was closer to fifty percent.<sup>11</sup>

The first CDEP scheme was established in early 1977 in Bamyili in the Northern Territory. The main motivation for establishing this first CDEP scheme was to provide an alternative to 'sit-down' money. Significantly, the initiative arose from the community itself and was not a 'solution' imposed by government.<sup>12</sup>

On 26 May 1977, the then Minister for Aboriginal Affairs, the Hon Ian Viner MP, announced the creation of the CDEP scheme program as part of a package of measures designed to deal with the employment problems noted in the Working Group's report. The Minister observed:

Unemployment benefits have been available to Aboriginals as to other Australians unable to obtain work. In some cases, as the working party report has revealed, the lack of activity when combined with unemployment benefit has produced serious social problems such as alcoholism and other health hazards. ... The Community Development Employment Program will provide work for all Aboriginals in a particular community who wish to work. Finance for the CDEPs will be provided to individual Aboriginal councils to enable the council to pay for work performed by individual community members, preferably on a cooperative, part-time or contractual basis. The total monies available to a community would be determined in consultation between the community and departmental officers. In determining the amounts available, the entitlements of individual community members to unemployment benefits would be taken into account.<sup>13</sup>

<sup>10</sup> Department of Social Security, *Annual Report - 1973-1974*, AGPS, 1974, p. 137.

<sup>11</sup> The Minister for Aboriginal Affairs, the Hon Ian Viner MP, *Hansard*, House of Representatives, 26 May 1977, p. 1921.

<sup>12</sup> The Minister for Aboriginal Affairs, the Hon Ian Viner MP, *Hansard*, House of Representatives, 26 May 1977, p. 1922.

<sup>13</sup> As above, p. 1921.

**Appendix 2** contains a copy of the original guidelines for the CDEP scheme, tabled in the Parliament on 22 May 1977.

At its inception, the CDEP scheme program had the following characteristics:

- the program was set up administratively with no legislative basis;
- the program was designed primarily to reduce the high level of Aboriginal unemployment;
- a secondary concern was the social effect on Indigenous communities of direct cash payments received as a result of unemployment benefits;
- the program was administered by the Department of Aboriginal Affairs;
- payments were notionally linked to unemployment benefits; and
- money was paid indirectly to CDEP participants through a community organisation.

To a large degree, the CDEP schemes in operation today continue to possess these characteristics.

By August 1977, four communities were participating in the CDEP scheme program. This expanded to approximately ten by 1978. The CDEP scheme program experienced strong growth through the 1980s, both in the number of people participating and the number of schemes.

Currently, the CDEP scheme program is administered by the Aboriginal and Torres Strait Islander Commissioner (ATSIC). As at 30 June 1997, the program includes 268 participating communities and 30,133 participants comprising 20,501 participants in remote localities and 9,630 in non-remote areas.<sup>14</sup> For many Indigenous people in remote locations the local CDEP scheme provides the only alternative to unemployment.

The CDEP scheme has undergone numerous reviews and inquiries since it was established. Despite these, there has been surprisingly little real change in the basic administration and structure of the CDEP scheme since the early 1980s.

Many of the issues involving the CDEP scheme are complex and historical. There has been persistent effort by the Commonwealth Government to identify and resolve the income and equity issues associated with the CDEP scheme. For example, in 1995 an Interdepartmental Committee of Review was established on the CDEP scheme. The Review was convened by the ATSIC and produced two lengthy discussion papers that identified some of the major equity issues involved.

On 1 July 1997, an independent review of the CDEP scheme commenced. The review was requested by the Expenditure Review Committee of the Commonwealth Cabinet and is chaired by Mr Ian Spicer. The review is due to report by the end of 1997. A copy of the terms of reference of the review comprise **Appendix 3**.

The most significant recent review for this inquiry is the 1991 Interdepartmental Review of Administration.

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<sup>14</sup> ATSIC, *Correspondence*, September 1997



## The 1991 Interdepartmental Review of Administration

This review examined a range of issues affecting the administration of the CDEP scheme. The steering committee comprised six senior ATSIC managers, two representatives from the Department of Finance, three representatives from the then Department of Employment Education and Training and two from the Department of Social Security.

### Double dipping

Before the 1991 Interdepartmental Review, a number of Department of Finance audit reports had canvassed the possibility of ‘double dipping’ between CDEP wages and unemployment benefits. The review characterised the problem this way:

Although CDEP has always been based on an assumption that UB (unemployment benefits) would not be paid and has been funded in part from UB offsets, there has never been any change to the Social Security Act to reflect this. The Act does not distinguish between CDEP work, which is partly funded from UB offsets, and other kinds of full or part time work. It is therefore possible for a person receiving CDEP wages to receive a part-payment of UB if the other eligibility criteria are met.<sup>15</sup>

CDEP participants were eligible for unemployment benefits if their income was below a certain amount. The CDEP participant was then able to access ‘top-up’ unemployment benefits. What the review described as ‘double dipping’ was not simultaneously receiving a CDEP ‘wage’ and full unemployment benefits but income from two government sources.

The review noted that it has been extremely rare for individuals participating in CDEP schemes to claim residual unemployment benefits although the situation in 1991 was described as ‘changing rapidly.’<sup>16</sup>

The review stated ‘[T]he capacity of CDEP participants to access another form of government support in addition to income received from a government funded program is likely to be of concern to Government.’<sup>17</sup>

The review noted a number of concerns about the direct payment of ‘top-up’ unemployment benefits to Indigenous persons involved in CDEP schemes. These concerns were that:

- availability of unemployment benefits to ‘top-up’ CDEP wages may erode the capacity of Aboriginal and Torres Strait Islander community councils to authoritatively manage their own communities as these payments will be made to individuals rather than to the CDEP community council;
- payment of residual unemployment benefits could have the effect of causing a shift in work patterns on some communities as work hours would be manipulated to facilitate access to ‘top-up’; and
- the Department of Social Security may be required to apply additional resources for individuals applying for and receiving partial unemployment benefits in CDEP communities.<sup>18</sup>

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<sup>15</sup> ATSIC, *Community Development Employment Projects: Interdepartmental Review of Administration*, June 1991, p. 41

<sup>16</sup> As above.

<sup>17</sup> As above.

The review recommended that due to the existence of simultaneous entitlement to CDEP wages and partial unemployment benefits, Government should resolve the issue by either increasing CDEP funding and/or legislating to exclude CDEP recipients from access to unemployment benefits.<sup>19</sup>

In relation to the option of increasing CDEP funds, the review observed:

The strength of this option is that it supports the characterisation of CDEP as an employment scheme consistent with AEDP [Aboriginal Economic Development Policy] objectives. The nexus between individual wage payments and unemployment benefits would be further weakened and this should help to overcome DSS concerns about adequate income levels for CDEP participants. ... this option would also ensure that CDEP participants would not be denied a level of income to which they are currently entitled. ... However, as the increased funds would be paid to communities rather than direct to individuals, it might be necessary to impose some sort of barrier to prevent continuing access by CDEP recipients to partial unemployment benefits.<sup>20</sup>

### **The legislative bar**

In November 1991, a provision was inserted in the Social Security Act that barred CDEP participants from receiving Job Start Allowance (JSA) and New Start Allowance (NSA). In 1991, unemployment benefits were replaced by the JSA) and the NSA.

The new sections 532A and 614A of the Social Security Act state that JSA and NSA are ‘not payable to a person for a period if that person has received, or may receive, income for that period that is paid by a community or group from funds provided under a Commonwealth funded employment program.’

When JSA was merged with NSA in 1996, section 532A was repealed. Section 614A still operates in the same form.

Section 23(1) of the Social Security Act defines a ‘Commonwealth funded employment program’ as ‘a Commonwealth program of funding to a community or group where the funding is based, either wholly or partly, on the number of people in that community or group who are, or are likely to be, qualified for job search or new start allowance.’ The CDEP scheme is considered a ‘Commonwealth funded employment program’.

Section 614A and sub-section 23(1) of the Social Security Act render CDEP scheme participants ineligible for ‘top-up’ unemployment benefits (residual NSA) and all the allowances and concessions that accrue if one receives unemployment benefits. Section 614A of the Social Security Act effectively stops CDEP participants from becoming ‘customers’ of the DSS.

CDEP participants are not the only groups subject to a legislative bar. Section 614 of the Social Security Act prevents the payment of the NSA to AUSTUDY and ABSTUDY recipients, to persons receiving a veterans’ pension or other Veterans Affairs payment, and to participants in the LEAP program.

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<sup>18</sup> ATSIC, Community Development Employment Projects: Interdepartmental Review of Administration, June 1991, p.42.

<sup>19</sup> As above, p. 45.

<sup>20</sup> As above, p. 43.

## Access to unemployment benefits

The current policy regarding income support seeks to ensure that persons lead as active a life as possible. Persons receiving income support are encouraged to participate in the work force through part-time work and to achieve financial independence by training, rehabilitation and financial counselling. Income support is maintained for those who need it.

The NSA is structured to ensure that impediments to part-time, and eventually full-time, participation in the work force are minimalised. This is reflected in the structure of the income test for the NSA that allows recipients to engage in part-time work and still be eligible for the allowance.<sup>21</sup>

The NSA is a payment for people who are unemployed and who are looking for full-time work. The NSA is income tested and provided that the other eligibility criteria are satisfied, an individual receiving some income from paid work may be eligible for the allowance. There is no benefit known as ‘top-up’ or ‘residual’ NSA. An individual is either entitled to receive the NSA or not. The income test for NSA permits a recipient to earn some income and remain eligible for the allowance. The amount of the allowance payable is reduced on a sliding scale with additional income earned and the allowance ceases to be payable at a certain level.

The NSA is not generally available as a ‘top-up’ payment for low income earners. The NSA is only available to those low income earners whose employment is casual or part-time in nature and who are able to demonstrate that they are meeting the activity test by seeking full-time employment or through another approved activity.

CDEP participants who earn a low income while participating in a CDEP scheme are not eligible for the NSA because of the existence of the legislative bar. If the legislative bar did not exist, low income CDEP participants would still have to satisfy the NSA activity test, namely that they are actively looking for work, before they would be eligible for the NSA. There is an exemption from the NSA activity test for persons resident in areas with no ‘locally accessible labour market’ and where cultural or geographical consideration makes compliance with the activity test difficult.<sup>22</sup> This section allows traditional Aboriginal people in remote locations to gain an exemption from the NSA activity test. This exemption is legislated and hence agreed by the Commonwealth Parliament.

## Chapter 2: The CDEP scheme today

### What is the CDEP scheme?

The CDEP scheme is an employment program, an alternative to unemployment benefits and an expression of Indigenous self determination.

For example, the ATSIC in its 1997 Guide for CDEP Organisations listed the following objectives as achievable through a CDEP scheme. These are:

- making jobs for Aboriginal and Torres Strait Islander people in remote, rural and urban communities where there are little or no employment opportunities;

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<sup>21</sup> The previous Commonwealth government set out these policy objectives in a document called *Working Nation*. The current income test for the NSA reflects the policy objectives expressed in *Working Nation*. See: the Hon P J Keating, *Working Nation – Policies and Programs*, AGPS, 1994, p. 152.

<sup>22</sup> Sub-section 6032(B), *Social Security Act 1991*.

- providing opportunities for the communities to improve their social, cultural and law or economic life through projects run by Aboriginal and Torres Strait Islander people;
- supporting organisations to do traditional work activities and cultural training, if this is one of the ways which will help Aboriginal and Torres Strait Islander people change their communities to how they would like it to be;
- supporting projects which help organisations to set up small business projects to become independent (free) of government help;
- learning skills in management, supervision and different jobs especially if it helps people to learn new things which can help them get jobs outside of the communities (if this is what people want) or start and run small business.<sup>23</sup>

Mr Ron Morony, General Manager, Economic Division, ATSIC, stated that the Commission has resisted the urge to define neatly what the CDEP scheme is and that the scheme defies conventional descriptions. Mr Morony observed:

It is often suggested that the ATSIC should consider defining the CDEP scheme as a training and/or employment scheme as its current objectives are considered too broad. When we consult with Aboriginal and Torres Strait Islander communities about this issue, they cannot see what the problem is. The scheme with its broad objectives enables communities to determine their own priorities and work as a collective to achieve their chosen objectives. ... ATSIC has always accepted that the scheme has much wider outcomes than simply employment, training or income support. While some government agencies have often found difficulties with a wider definition of the scheme, it must be remembered that CDEP commenced on the instigation of Indigenous people. As such, it continues to have the ongoing support of the ATSIC Commissioners who recognise the scheme's proven potential to generate positive social, cultural, economic and community development outcomes. In reality there is no similar program.<sup>24</sup>

Currently, the CDEP scheme is most accurately classified as a 'Commonwealth funded employment program' and this is reflected in the administrative treatment of CDEP participants by the Department of Social Security.<sup>25</sup> Despite this, the CDEP scheme is not capable of consistent classification. CDEP income is treated in quite different ways by the taxation and social welfare system. These differences in treatment are discussed in detail in Chapter 3.

## Guidelines

The CDEP scheme has no legislative base and is administratively defined. There are, however, legislative provisions that affect CDEP participants such as Section 614A of the Social Security Act.

The ATSIC issues guidelines in its grant manual. Non-compliance with a grant condition may result in some component of a community organisation's CDEP funding being withheld.<sup>26</sup>

One of the consequences of the lack of a legislative base is that CDEP participants, and the communities where CDEP schemes operate, have, for practical purposes, very limited appeal rights against decisions that are adverse to them. This issue is further discussed in Chapter 4.

<sup>23</sup> ATSIC, *Guide for CDEP Organisations*, January 1997, p. 13.

<sup>24</sup> ATSIC, *Correspondence*, 6 May 1997.

<sup>25</sup> See: Section 23(1) of the Social Security Act.

<sup>26</sup> ATSIC, *Guide for CDEP Organisations*, 1997, p. 16.

## Eligibility

CDEP schemes are limited to Aboriginal and Torres Strait Islander communities. One distinctive feature of CDEP schemes is that there must be a recognised 'Aboriginal and Torres Strait Islander body' through which CDEP money can be channelled.<sup>27</sup>

Participation in a CDEP scheme is voluntary. Individuals may participate in their local CDEP scheme or receive unemployment benefits. Under the ATSIC's guidelines, CDEP organisations are required to offer all participants the opportunity to earn at least the equivalent of their NSA entitlement as a CDEP wage.

To be eligible to participate in a CDEP scheme and be placed on a participant schedule, an individual must:

- be accepted as a member of the Aboriginal or Torres Strait Islander community which is on CDEP;
- be at least 16 years of age and eligible for NSA, Sole Parent Pension or the Youth Training Allowance;
- elect to forgo their Department of Social Security Allowance (except the Sole Parent Pension);
- be available to take up an offer of work; and
- currently be in the community or on approved leave.<sup>28</sup>

Under special circumstances, non-Indigenous people who are accepted by an Indigenous community can participate in the local CDEP scheme.

## Work that can be undertaken through a CDEP scheme

The type of work that a community can engage in through a CDEP scheme is very broad and discretionary. The ATSIC funding manual states that each participating community can determine its own work activities and lists the following as common types of work done through a CDEP scheme:

- support and development of community infrastructure and housing;
- support and development of community-based enterprises, such as tourism, retailing and contracting;
- community services, such as administration and broadcasting;
- arts and crafts;
- market gardening, farming and fishing;
- outstation development;

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<sup>27</sup> ATSIC, *Funding Procedures Manual*, Part II, Division C, Chapter 1, July 1997, p. 20.

<sup>28</sup> ATSIC, *Funding Procedures Manual*, Part II, Division C, Chapter 1, July 1997, p. 20.

- land care; and
- support of cultural activities, education and sport.

### **What monies make up CDEP scheme funding**

The CDEP scheme is more than the pooling of all its participants' entitlement to unemployment benefits. CDEP grants comprise three elements. These are funding for:

- wages;
- recurrent expenses; and
- capital expenses.

#### **Wages**

Before 1992, the average per participant funding for a CDEP scheme was tied to unemployment entitlements. The CDEP scheme program was notionally funded through out-lays intended as unemployment benefits.

Since 1992, funding has been based on an average weekly per participant rate (APP rate). The introduction of the APP rate weakened the relationship between CDEP scheme funding and social security entitlements.

The APP rate is higher than the NSA rate and this reflects the recommendation of the 1991 Interdepartmental Review that CDEP funding be increased in the event that a legislative bar is introduced.

The APP rate is determined by the Department of Finance and has been updated biannually in accordance with changes in the Consumer Price Index.<sup>29</sup>

CDEP wages can only be paid to persons who are listed on the participant schedules. These schedules must be lodged quarterly with the ATSIC. A lump sum amount for wages is disbursed to the CDEP organisation each quarter and it is the responsibility of the organisation to distribute wages to the CDEP participants. The community organisation administering a CDEP scheme has wide discretion as to how wages are distributed.

#### **Recurrent Expenses**

CDEP schemes receive funding for recurrent expenses such as insurance, workers' compensation insurance, office supplies, fuel and the salaries for the CDEP administrator and bookkeeper. This money is paid through the relevant ATSIC regional council and there is some variation depending on the activities undertaken by the community.<sup>30</sup>

#### **Capital Expenses**

CDEP schemes are funded for the purchase of capital items. The ATSIC defines a capital item as 'something that costs more than \$1,000 and which will last a long time.'<sup>31</sup> Like recurrent funding,

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<sup>29</sup> Deloitte Touche Tomatsu, *No Reverse Gear: A National Review of the Community Development Employment Projects Scheme*, Appendix 1, 1993, p. 4.

<sup>30</sup> ATSIC, *Guide for CDEP Organisations*, January 1997, p. 15.

<sup>31</sup> As above, p.16.

capital funding is determined by the relevant ATSI regional council and varies in accordance with the priorities of the regional council.

### **A comparison of the NSA rate and the CDEP APP rate**

The APP rate determines the amount of funding that the community organisation administering a CDEP scheme receives. The APP rate does not necessarily reflect the wages received by a participant of a CDEP scheme. Tables 1,2,3 and 4 provide a detailed comparison of the APP rate with the NSA rate.

**Table 1: Singles without children**

	<b>Remote</b>	<b>Remote</b>	<b>Non-Remote</b>	<b>Non-Remote</b>
<b>Payments Per Fortnight (\$)</b>	NSA	CDEP APP Rate	NSA	CDEP APP rate
<b>Basic Payment</b>	\$321.50	\$364.30	\$321.50	\$328.10
<b>Remote Area Allowance</b>	\$17.50	NA	NA	NA
<b>Rent Assistance</b>	\$49.80	NA	\$54.80	NA
<b>Minus tax</b>		-\$28.00		-\$28.00
<b>Total</b>	\$388.80	\$336.30	\$376.30	\$300.10

**Table 2: Couples without children**

	<b>Remote</b>	<b>Remote</b>	<b>Non-Remote</b>	<b>Non-Remote</b>
<b>Combined Payments Per Fortnight (\$)</b>	NSA	CDEP APP Rate	NSA	CDEP APP rate
<b>Basic Payment</b>	\$580.20	\$728.60	\$580.20	\$656.20
<b>Remote Area Allowance</b>	\$30.00	NA	NA	NA
<b>Rent Assistance</b>	\$53.40	NA	\$60.60	NA
<b>Minus Tax</b>		-\$56.00		-\$28.00
<b>Total</b>	\$663.60	\$672.60	\$640.80	\$628.20

**Table 3: Couples With Children B One Partner on NSA or APP rate**

	<b>Remote</b>	<b>Remote</b>	<b>Non-Remote</b>	<b>Non-Remote</b>
<b>Combined Payments Per Fortnight (\$)</b>	NSA	CDEP APP Rate	NSA	CDEP APP rate
<b>Basic Payment</b>	\$290.10	\$364.30	\$290.10	\$328.10
<b>Parenting Allowance</b>	\$290.10	\$290.10	\$290.10	\$290.10
<b>Rent Allowance</b>	\$58.80	\$35.00	\$77.60	\$70.00
<b>Remote Area All</b>	\$44.00	NA	NA	NA
<b>Minus Tax</b>		B\$28.00		
<b>Total</b>	\$683.00	\$661.40	\$657.80	\$688.20

**Table 4: Couples With Children B Both Partners on NSA or APP rate**

	<b>Remote</b>	<b>Remote</b>	<b>Non-Remote</b>	<b>Non-Remote</b>
<b>Combined Payments Per Fortnight (\$)</b>	NSA	CDEP APP Rate	NSA	CDEP APP rate
<b>Basic Payment</b>	\$580.20	\$728.60	\$580.20	\$656.20
<b>Remote Area Allowance</b>	\$44.00	NA	NA	NA
<b>Rent Assistance</b>	\$53.40	\$30.25	\$77.60	\$60.50
<b>Minus Tax</b>		-\$56.00		
<b>Total</b>	\$677.60	\$702.85	\$657.80	\$716.70

Source: Aboriginal and Torres Strait Islander Commission, Correspondence, 17 November 1997.

### Notes

- 'NA' ' not applicable.
- There is no remote area allowance for remote CDEP participants.
- There is a remote and non-remote APP rate.
- The maximum rate of NSA has been used.
- The Parenting Allowance is not available when both partners are on NSA or participating in a CDEP.
- The Rent Allowance figures are the estimated average payment for families with children which for all categories is dependent on the level of rent paid.
- The DSS Remote Area Allowance figure in Table 4 is for a couple with two children. The basic rate increases by \$7 per fortnight for each child.
- Health Care Cards are available to CDEP couples, subject to the production of an income statement every six months.



## Income per CDEP participant

Calculating the income an individual receives through a CDEP scheme is more difficult than comparing the APP rate with an individual's social security entitlement.

First, the level of an individual's payment through a CDEP scheme will reflect the amount of work that is performed. An individual CDEP participant's 'wage' will not necessarily reflect the APP rate.

Second, the wages that a person participating in a CDEP can receive has a ceiling but no formal minimum. CDEP participants' weekly wage can be up to four times the APP rate if the individual works the maximum hours in his or her CDEP scheme and earns the maximum amount of additional income.<sup>32</sup> There is no formal minimum wage although some CDEP schemes pay participants who do not work a 'sit down' wage. The 'sit down' wage is often between \$40 to \$60 per fortnight. Generally, if an individual on a CDEP participant schedule does not work, or works only a few hours, his or her wage will reflect this.

The CDEP scheme is structured to produce income inequality among CDEP participants. This is justified as creating an incentive to work. Additionally, some of the income inequalities produced by the structure of the CDEP scheme are perceived as being off-set by the communal character of the scheme.

Third, CDEP participants have the capacity to earn additional income through paid employment outside of their CDEP scheme. The total gross income of a CDEP participant can be significantly higher than the NSA entitlement. This issue is dealt with in Chapter 3.

## Income inequalities

Disparity between an individual's entitlements to social security and the wages received through participation in a CDEP scheme has been a source of concern in government and Indigenous communities for some time.

For example, the Royal Commission into Aboriginal Deaths in Custody noted:

A criticism of the operation of the CDEP schemes is that in some communities, individuals are receiving less than their UB entitlement, either because they are under paid, or because they are not offered work. Commissioner Dodson was told of situations in one community where married men received a CDEP wage equivalent to the married benefit, while their employed spouse also received a single benefit. Wage grant equivalents would include only the equivalent of a married UB for the male partner. In such cases, unless the wage pool is supplemented from other sources, it must be presumed that other individuals are missing out.<sup>33</sup>

The 1991 Interdepartmental Review of Administration of the CDEP scheme program also noted this problem and suggested:

... some protection to people who are not offered sufficient work should be available through the unemployment benefit system. Should dual payment of CDEP wages and partial payment of UB be legislatively barred, it should be possible for a person who is

<sup>32</sup> CDEP participants can earn twice the APP rate within a CDEP and then twice the APP rate as additional income: ATSIIC, *Funding Procedures Manual*, Part II, Division C, Chapter 1, July 1997, p. 2.

<sup>33</sup> Royal Commission into Aboriginal Deaths in Custody, *National Report*, Volume 4, AGPS, 1991, p. 431.

disadvantaged by not being offered sufficient work to decline participation in CDEP and receive UB without penalty.<sup>34</sup>

More recently, the Secretary of the Department of Social Security, Mr A S Blunn AO, noted in correspondence to the Race Discrimination Commissioner that there is a wide spread of incomes amongst CDEP participants. The Secretary observed:

NATSI<sup>35</sup> found that ten percent of CDEP participants are receiving \$25,000 or more per annum, while 16 percent are receiving equal to NSA or less. Six percent are paid well below the NSA rate, the so called 'sit down wage', a payment sometimes around \$60/fortnight made to people when they are not working.<sup>36</sup>

There is a lack of precise empirical data concerning the income of persons who participate in CDEP schemes. Table 5 seeks to provide a comparison of the income received by CDEP participants with other sources of income support and employment.

**Table 5: Persons who are employed on CDEP: average annual income, average annual income from CDEP and average annual income from government cash benefits by income unit type**

<b>Income Unit Type</b>	<b>Average Annual Income</b>	<b>Average Annual CDEP Income</b>	<b>Average Annual GCB Income</b>
<b>Single Person</b>	10,400	10,025	6,717
<b>Single Parent</b>			
1 Dependant	14,976	9,800	6,117
2 Dependants	16,982	11,679	6,684
3+ Dependants	19,061	9,673	11,312
<b>Couple Only</b>	13,007	12,043	6,750
<b>Couple With Dependants</b>			
1 Dependant	13,261	12,662	2,798
2 Dependants	13,872	12,572	4,721
3 Dependants	16,623	14,332	7,326
4+ Dependants	15,140	12,104	8,605
<b>Total</b>	<b>12,684</b>	<b>11,411</b>	<b>6,342</b>

### Notes

- GCB is 'government cash benefits', which includes all DSS and DEETYA payments.
- The slight discrepancies in this data relate to differences in the data standards employed by the Australian Bureau of Statistics and the DSS.
- CDEP income includes income earned by individuals employed by the CDEP scheme who are not participants, that is, funded positions such as the administrator or the book keeper. The incomes of persons in these positions are generally higher than participants' wages. Accordingly, the average CDEP income is higher than if only participant wages were taken into account.

<sup>34</sup> ATSIC, *Community Development Employment Projects: Interdepartmental Review of Administration*, June 1991, p. 46.

<sup>35</sup> Australian Bureau of Statistics, *National Aboriginal and Torres Strait Islander Survey*, AGPS, 1994.

<sup>36</sup> DSS, *Correspondence*, 23 June 1997, p. 3.

- This data is for all Australia. The survey period is 1991-1994.

Source: Australian Bureau of Statistics, *National Aboriginal and Torres Strait Islander Survey*, 1994.

## **The principal impacts of the CDEP scheme**

The ‘success’ of the CDEP scheme is difficult to gauge. This is due to the loose definition of the CDEP scheme’s objectives and the fact that some of the objectives of the program conflict. For example, in remote areas the objectives of self-determination and improved employment and educational outcomes for Indigenous participants may be inconsistent. The CDEP scheme program contributes to the viability of many remote Indigenous communities and reinforces the ‘separateness’ of those communities from mainstream labour market opportunities.

The Royal Commission into Aboriginal Deaths in Custody noted that the CDEP scheme was a source of much change in many Indigenous communities and, while the program had some drawbacks, there are a number of positive benefits that Indigenous communities appear to derive from it.<sup>37</sup>

If expansion and acceptance by Indigenous communities and government is the criteria of ‘success’, the CDEP scheme has been very successful. The program has experienced consistent growth since its inception and appears to have adapted to the diverse circumstances of Australia’s Indigenous peoples. Further, CDEP schemes have wide acceptance among Indigenous communities and the support of all recent Commonwealth governments.

### **Employment and social outcomes**

The Australian Bureau of Statistics in its 1994 National Aboriginal and Torres Strait Islander Survey (NATSIS) observed that, in the survey period 1991 to 1994, there had been no improvement in the employment outcomes for Indigenous people and that the lack of deterioration in the official statistics can largely be credited to expansion in the CDEP scheme. The Australian Bureau of Statistics observed:

Despite efforts to raise Indigenous labour force status closer to the levels found in the general work force, the analysis of survey data indicated that no movement towards this goal occurred between 1991 and 1994. While the number of Indigenous people in work continued to rise, this expansion barely kept up with the growth in working age population resulting in little or no improvement in the employment/population ratio. Furthermore, such new jobs as were created have been overwhelmingly as a consequence of the continued expansion of the CDEP scheme.<sup>38</sup>

The report emphasises that employment in CDEP schemes has filled a void in areas where mainstream job opportunities are scarce or non-existent. In particular, the report found that ‘one estimate derived from the survey data suggests that without the CDEP scheme, the employment/population ratio for Indigenous people would have been halved in 1994 while the unemployment rate would have been twice as high.’<sup>39</sup> This report also states that, as most CDEP

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<sup>37</sup> Royal Commission into Aboriginal Deaths in Custody, *National Report*, Volume 4, AGPS, 1991, p. 425.

<sup>38</sup> ABS, *1994 National Aboriginal and Torres Strait Islander Survey: Employment Outcomes for Indigenous Australians*, AGPS, 1996, p. 1.

<sup>39</sup> As above, p. 4.

employment is part-time, Indigenous workers as a whole have been increasingly more reliant than the rest of the workforce on part-time employment.<sup>40</sup>

In a recent evaluation of the CDEP scheme by the ATSIIC Office of Evaluation and Audit, CDEP scheme participation was found to be associated with increased personal income, sense of cultural identity and decreased alcohol consumption and police arrests.<sup>41</sup> The final report of the Office of Evaluation and Audit noted:

CDEP participants clearly derive many benefits from their work in CDEP. This is evident from the reasons they gave for joining the CDEP, their satisfaction with the CDEP, and the additional income, training and improved mainstream employment opportunities they obtained from participation in a CDEP.<sup>42</sup>

The evaluation found that 24% of urban CDEP participants went straight to a job immediately after leaving the CDEP and that ex-participants had better employment outcomes than non-Indigenous job seekers registered with the then Commonwealth Employment Service.<sup>43</sup>

In its interim report, the evaluation found that there was no significant association between CDEP participation and improved health or desire to pursue studies. In fact, CDEP participants were even less likely to undertake further study when compared with persons who were unemployed.<sup>44</sup> The review noted that this may reflect a 'higher acceptance of the status quo regarding employment opportunities among CDEP participants compared with that among [Indigenous] unemployed persons.'<sup>45</sup> The final report of the review confirmed these findings but noted that these aspects of CDEP participation should be seen as being off-set by the positive training outcomes and increased readiness for work experienced by CDEP participants.<sup>46</sup>

In the 1993 review of the CDEP scheme *No Reverse Gear*, it was noted:

It is unclear whether the program has generated long term and sustainable jobs, except where a small number of enterprises has been established. ... The absence of a career path for the majority of individuals working in the program presents an important equity concern. Marked variations in participation rates also signal some concerns about incentives, supervision and the perceived relevance of the work activity. Repetition and the menial nature of some work offered in longer running and poorly planned CDEPs is a further detriment to more optimal participation rates. The issue of the level of participation of women in the CDEP is one which needs to be addressed.<sup>47</sup>

## **Self-determination**

The CDEP scheme is highly flexible and allows an Indigenous community 'to determine its own work activities.'<sup>48</sup> The CDEP scheme explicitly contemplates Indigenous communities engaging in

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<sup>40</sup> As above, p. 1.

<sup>41</sup> Office of Evaluation and Audit, *Evaluation of the Community Development Employment Projects Program – Final Report*, September 1997, ATSIIC, pp. 43-49.

<sup>42</sup> As above, p. 24.

<sup>43</sup> As above, p. 32.

<sup>44</sup> Office of Evaluation and Audit, *Evaluation of the Community Development Employment Projects Program – Interim Report*, April 1997, ATSIIC, p. 24.

<sup>45</sup> As above, p. 24.

<sup>46</sup> Office of Evaluation and Audit, *Evaluation of the Community Development Employment Projects Program – Final Report*, September 1997, ATSIIC, p. 24.

<sup>47</sup> Deloitte Touche Tohmatsu, *No Reverse Gear: A National Review of the Community Development Employment Projects Scheme*, 1993, p. 54.

<sup>48</sup> ATSIIC, *Funding Procedures Manual*, Part II, Division C, Chapter 1, July 1997, p. 3.

traditional activities that support the economic and cultural life of the community. The program has played a significant part in encouraging and facilitating self-determination in Indigenous communities.

An important example of how the CDEP scheme has assisted Indigenous people in their desire to live a life that reflects their history and culture is the support given to the 'out station' movement. The 'out station' movement describes the movement of Indigenous people from mission settlements back to their traditional lands.<sup>49</sup> The 1993 review of the CDEP scheme, *No Reverse Gear*, observed:

In many cases, CDEP has provided the means of enabling the ongoing development management of the out station by providing the only form of employment available to residents and through the construction and maintenance of airstrips, roads, water supplies and other essential services. The year round viability of many remote communities is highly dependent on the CDEP.<sup>50</sup>

### **Savings to government**

In many remote areas, the local CDEP scheme provides services and facilities that are usually provided and paid for by government. In this sense, the CDEP scheme provides a saving to local, state and federal governments by substituting for government services.

This phenomenon was noted in the 1993 report *No Reverse Gear*:

The servicing of remote out stations remains a highly problematic and contentious area for State and Territory government. Many CDEPs now find themselves in the position of being the only agency with either a capability or preparedness to provide and support the wish of people to return to more traditional and usually isolated living areas. Policy in several States remains unclear in respect of this area. By way of example, in Western Australia, the State Health Department will not provide resident community health services on out stations. It provides some circuit based services supplemented in emergency situations by the Flying Doctor Service. This has left CDEPs with the task of ensuring essential services infrastructure including access roads, airstrips and related communications requirements to ensure viability and access.<sup>51</sup>

CDEP schemes are credited with providing administration and infrastructure services in remote and rural Indigenous communities. In *No Reverse Gear*, it was also noted that the CDEP office is increasingly the main point of entry for government agencies and provides important managerial and administrative capability within Indigenous communities.<sup>52</sup>

### **Recent developments: Work for the Dole**

On 17 October 1997, the Minister for Employment Education, Training and Youth Affairs, the Hon Dr David Kemp MP, announced the commencement of a Work for the Dole pilot project. The Work for the Dole pilot projects will be delivered under the Social Security Act and are classified as 'an approved program of work for unemployment payment'.<sup>53</sup> The program is administered by the DEETYA.

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<sup>49</sup> Collmann, J., *Fringe Dwellers and Welfare: Aboriginal Responses to Bureaucracy*, University of Queensland Press, 1988, pp. 36-37.

<sup>50</sup> Deloitte Touche Tohmatsu, *No Reverse Gear: A National Review of the Community Development Employment Projects Scheme*, 1993, p. 54.

<sup>51</sup> As above, p. 84.

<sup>52</sup> As above, p. 84.

<sup>53</sup> *Social Security Legislation Amendment (Work for the Dole) Act 1997*.

The stated aim of the Work for the Dole initiative is to provide job seekers with the opportunity to contribute to their local communities in a constructive and worthwhile manner and to assist unemployed people in developing self-esteem and good work habits. The Work for the Dole initiative is not intended as a solution to youth unemployment or related training problems.<sup>54</sup>

A person involved in a Work for the Dole project remains a NSA recipient and eligible for all the allowances and benefits available to NSA recipients. To be eligible to participate in a Work for the Dole project, a person must be 18 years old, registered for at least six months as unemployed, not be in case management by the DEETYA and be on full NSA. While working on a Work for the Dole project, the individual receives the NSA and a supplement of \$20 a fortnight to deal with travel and other expenses. The only difference with other NSA recipients is that a Work for the Dole participant agrees, as part of his or her activity agreement, to work within a particular project. Failure to work will constitute a breach of the person's activity agreement and may result in the NSA not being payable.

Significantly, CDEP participants will not be eligible for Work for the Dole projects.<sup>55</sup> Some of the possible implications of Work for the Dole are dealt with in Chapter 6.

## **Chapter 3: The treatment of CDEP participants**

### **Introduction**

The terms of reference for this inquiry require the Race Discrimination Commissioner to 'determine whether the legislation [relating to the CDEP scheme] or those policies have adverse discriminatory consequences that are contrary to the human rights of participants in the CDEP.'

The treatment of CDEP participants by Commonwealth legislation and agencies is outlined below. How this treatment sits with racial discrimination law is dealt with in Chapter 5.

### **The absence of clear standards**

The CDEP scheme is not clearly defined as either an employment program, part of the social security system or paid work. The classification of income earned through CDEP schemes reflects this ambiguity.

CDEP participants are concerned that there is no consistency in the treatment of the income that they derive from their local CDEP scheme. CDEP income can be classified as either a standard wage or a form of income support. Depending on how CDEP income is classified, quite different benefits and entitlements accrue. In many respects, the equity issues associated with the CDEP scheme are determined by the differences in the classification of CDEP income.

The treatment of CDEP income in relation to a range of government benefits and rebates is discussed below.

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<sup>54</sup> The Hon Dr David Kemp MP, Second Reading Speech, Social Security Legislation Amendment (Work for the Dole) Bill 1997, p. 1.

<sup>55</sup> DEETYA, *Work for the Dole Pilot Project Handbook*, Commonwealth of Australia, 1997, p. 19.

## Australian Taxation Office treatment

Income derived through participation in a CDEP scheme is classified as assessable income under the Income Tax Assessment Act. The taxation system treats CDEP participants as wage-earners. Most CDEP participants earn relatively small amounts so they are low income earners.

Due to the pensioner and beneficial rebate, a social security recipient is not required to pay tax unless he or she earns significant amounts of additional income. For practical purposes, tax is not assessed on income derived from a social security benefit. Another feature of social security payments is that they are inalienable.<sup>56</sup>

There are a number of rebates available to ordinary tax-payers and CDEP participants are eligible for these rebates. In this respect, Mr R C Matthews, First Assistant Commissioner, Australian Taxation Office, informed the Commission:

Tax rebates available to CDEP participants are the same as those available to other resident individual tax payers of Australia, and include the low income, dependants, housekeeper, sole parent, zone, personal superannuation contribution and medical expenses. CDEP participants are eligible to claim any of these rebates if they satisfy the grounds for allowing the rebate in question. A total of all the rebates allowable to a tax payer cannot exceed the amount of taxation otherwise payable by the tax payer, that is, rebates can only reduce the tax liability to 'nil'.<sup>57</sup>

There is one rebate that CDEP participants cannot claim. This is the beneficial rebate.<sup>58</sup> The beneficial rebate allows taxpayers whose assessable income includes certain social security payments and educational allowances<sup>59</sup> to claim a rebate of some of the tax that they may have paid. As noted above, one of the effects of the beneficial rebate is that social security recipients do not pay tax if they do not earn additional income. The size of the rebate ranges from \$100 to \$1,000 per annum depending on family circumstances.<sup>60</sup>

The treatment of CDEP scheme income by the Australian Taxation Office is consistent with the characterisation of CDEP income as 'wages'.

## Department of Social Security treatment

The CDEP scheme is a 'Commonwealth funded employment program' in the social security system. This derives from Section 614A of the Social Security Act.

Section 614A of the Social Security Act functions as a legislative bar and renders CDEP participants ineligible for the NSA. As discussed earlier, a feature of the NSA is that low income wage-earners are eligible to receive a partial payment to 'top-up' their income if it falls below a certain amount and they are searching for full-time work. The legislative bar was enacted due to concerns over 'double

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<sup>56</sup> Namely, unable to be garnished for the non-payment of a judgment debt.

<sup>57</sup> Australian Taxation Office, *Submission No. 11*, 7 June 1995, p. 1.

<sup>58</sup> Taxation Determination, 93/173, *Can participants in the Community Development Employment Program who forgo unemployment benefits still claim the beneficiary rebate?*

<sup>59</sup> Newstart Allowance, Youth Training Allowance, Sickness Allowance, Partner Allowance, Special Benefit, Widow Allowance, Home Child Care Allowance, Parenting Allowance, AUSTUDY, ABSTUDY, Veterans' Children Scheme and Assistance for Isolated Children.

<sup>60</sup> The list of rebateable benefits for the beneficial rebate is contained in Section 160AAA(1) of the Income Tax Assessment Act and includes NSA. Taxation Determination 93/173 states that payments under the CDEP Scheme do not come within the definition of rebateable benefits contained in Sub-section 160AAA (1), and are treated as 'wages'.

dipping' noted in the 1991 Interdepartmental Review of Administration. 'Double dipping' was construed as receiving income from two government sources.

Section 614A means that CDEP participants are not, and cannot become, 'customers' of the DSS. A 'customer' of the DSS is entitled to a wide array of additional allowances and services. Many of these 'add on' allowances are significant and were not in existence, or contemplated, when the CDEP scheme started. The legislative bar denies CDEP participants access to these allowances.

These additional allowances are dealt with below.

### **Rent Assistance**

Rent Assistance is available to social security recipients and assists in paying for private rental accommodation if rent is paid over certain thresholds. The amount of assistance can be up to \$98.80 per fortnight.

CDEP participants cannot receive the Rental Allowance although CDEP participants who have dependant children receive a Rental Allowance as part of the additional Family Payment. Like low income wage-earners, CDEP participants cannot receive Rent Assistance if they have no children but they can get Rent Assistance through the additional Family Payment.

In its submission, the DSS stated that CDEP participants, exclusion from the Rental Allowance has the following basis and effect:

The Social Security Act states that entitlement to a social security pension, allowance or family payment is a precondition for entitlement to Rent Allowance, so the exclusion of non-DSS customers, including CDEP participants, has a legislative base. CDEP participants who are family payment recipients receive RA [rent assistance] on the same basis as all other family payment recipients. CDEP participants without dependant children are not entitled to RA. They are in the same position as other low income earners not receiving a DSS pension or allowance. According to the 1994 ABS survey of Aboriginal and Torres Strait Islanders, only a small proportion of Aboriginal and Torres Strait Islander people pay rents which exceed the rent threshold above which RA is paid. Many live in remote or rural areas and in subsidised housing, and pay very low rents in comparison to most rent assistance customers. The current thresholds for RA are \$104.60 per fortnight for couples without children and \$62.60 per fortnight for people without children.<sup>61</sup>

The DSS noted that it is currently working with the ATSIC to 'consider Rent Assistance eligibility for CDEP participants without children.'<sup>62</sup>

### **The Family Payment**

The Family Payment assists families with the cost of raising children.

The Family Payment is paid to low income families and is income tested. CDEP participants can receive the Family Payment if they satisfy the income test.

<sup>61</sup> DSS, Submission No. 10, p. 2.

<sup>62</sup> DSS, *Correspondence*, 23 June 1997, p. 5.



## Parenting Allowance

In the 1994 White Paper on *Employment and Growth*, the Commonwealth Government announced the introduction of a Parenting Allowance from 1 July 1995. The objective of the payment is to assist low income couples with children by providing an independent income to the primary carer and a choice about the level of their workforce participation.

Parenting Allowance incorporates the Home Child-care Allowance. The basic component of the Parenting Allowance is paid at a maximum rate of \$65.10 per fortnight and is income-tested on the income of the recipient only. The allowance is not subject to an assets test and is non-taxable. The additional component of the allowance is \$225 per fortnight. The additional component is taxable, income tested on the income of the recipient and the recipient's partner and assets tested.

The Social Security Act precludes eligibility for the Parenting Allowance for CDEP participants although they may qualify for the Family Payment as low income earners if they have dependant children. Non-participant partners may qualify for the Parenting Allowance with the partner's CDEP income counted under the income test.

Particular concerns were raised about the effect on Indigenous women of the access regime to Parenting Allowance. Relatively low wages are paid to CDEP participants. Often an individual with dependant children who is participating in CDEP - generally a woman - may choose to withdraw from the CDEP scheme so as to be eligible for basic Parenting Allowance. This can operate as a significant disincentive to Aboriginal and Torres Strait Islander women who may wish to participate in their community CDEP scheme.

The Gundarde Community Aboriginal Corporation noted the following concerns in correspondence with the Commission:

We believe that our workers are being treated unfairly. We work for our dole! We trialed a system of distributing income between partners in our CDEP scheme recognising 'Home duties' as a CDEP supported occupation. Male workers reduced their work hours and their female partners were paid their share. ... Without any discussion or consultation, the DSS suddenly cut our workers, parenting allowance and some of their Family Assistance Scheme payments. ... Our families cannot survive on this reduced income. We live in a rural town, pay rent, electricity, and living costs are extremely high. We are prepared to return to the former system if necessary so as to retain our citizenship rights.

The Department of Social Security observed in its submission:

Some CDEP participants may have partners who are not offered employment under the CDEP scheme. Currently, in such cases, the partners may be eligible for JSA [job search allowance] or NSA. However, in some situations the partners may only be eligible for Special Benefit as their child rearing activities do not enable them to satisfy the work activity test for JSA/NSA. With the introduction of PgA [parenting allowance], partners who care for their children will be able to apply for PgA. The income of the partner who is involved in CDEP activities is treated as income of the partner under the new allowance income test. This new income test will enable the partner to receive \$472 a fortnight before income begins to affect the partner receiving PgA.<sup>63</sup>

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<sup>63</sup> DSS, *Submission No. 10*, p. 6.

In the 1997-98 budget, the Government announced that it intends to replace the Parenting Allowance and the Sole Parent Pension with a 'Parenting Payment' from 20 March 1998. The differences in the treatment of CDEP income between the Sole Parent Pension and Parenting Allowance will initially be retained under the new 'single' and 'partnered' rates of parenting payment. Unlike Parenting Allowance, CDEP income earned by Sole Parent Pensioners is taken into account as ordinary income.

The DSS has indicated that it will consider, in the broader context of payment simplification, the possibility of aligning the treatment of CDEP income into the two components of the new payment.<sup>64</sup>

### **Mobility Allowance**

The Mobility Allowance assists with transport expenses and is paid to persons who have a disability but are substantially involved in employment or vocational employment.

CDEP participants who meet the requirements in the Social Security Act are eligible for the Mobility Allowance.

### **Telephone Allowance**

The Telephone Allowance, currently valued at \$15.40 a quarter, is paid to pensioners who are telephone subscribers. The majority of NSA recipients are not pensioners and are not generally eligible for the Telephone Allowance. However, a small category of NSA recipients are eligible B those over 60 who have received income support for more than nine months.

CDEP participants are not eligible to receive the Telephone Allowance.

### **Pharmaceutical Allowance**

The Pharmaceutical Allowance, currently valued at \$5.40 per fortnight, is paid by the DSS to those NSA recipients who are over 60 years old and have been continuously receiving NSA payments for nine months or more and to other NSA recipients during periods of incapacity for work.<sup>65</sup>

The Pharmaceutical Allowance is not available to CDEP participants. The treatment of sick or incapacitated CDEP participants is currently on the agenda in discussions between the DSS and the ATSIC.<sup>66</sup>

### **Concession Cards**

A number of concession cards are issued in the social security system. Two main concession cards are the Pensioner Concession Card (PCC) and the Health Care Card (HCC). Eligibility for both these cards relates to being a customer of the DSS and reinforces the significance of that status.

The PCC entitles holders to a wide range of concessions. In the Commonwealth sphere, it entitles the holder to concessional prescriptions under the Pharmaceutical Benefits Scheme, concessional services from Australian Hearing Services and concessions on telephone connections and services from Telstra.<sup>67</sup>

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<sup>64</sup> DSS, *Correspondence*, 23 June 1997, p.4.

<sup>65</sup> This allowance is calculated under the pension or benefit rate calculators in Sections 1064 to 1068 of the Social Security Act.

<sup>66</sup> DSS, *Correspondence*, 23 June 1997.

<sup>67</sup> These Telstra concessions are over and above the Telephone Allowance paid by DSS discussed on previous page.

The States and Territories also provide a range of concessions for holders of PCCs. Some non-government organisations, such as insurance companies, gas companies and retail outlets, provide services to PCC holders at concessional rates. In the local government sphere, PCC holders are entitled to concessions on land rates, water and sewerage charges where applicable, dog licences and numerous other payments.

The PCC is issued by the DSS to all pensioners and recipients of the Mature Age and Mature Age Partner Allowance. It is also issued to recipients of NSA, Sickness Allowance, Widow Allowance or Special Benefit, who are over 60 and who have been receiving income support for more than nine months.

CDEP participants are not entitled to the PCC. This is consistent with the treatment of CDEP participants as wage-earners.

The HCC is issued by the DSS to recipients of NSA, Partner Allowance, Widow Allowance or Special Benefit (who do not qualify for a PCC), the Youth Training Allowance, Drought Relief Payment and Parenting Allowance. Low income earners also qualify for a HCC.

The HCC entitles its holders to a range of concessions similar to the PCC.

Generally, CDEP participants can obtain a HCC as long as they satisfy an income test. The test is currently set at \$286 per week for a single person, \$476 per week for a partnered couple, \$501 per week for a single parent with one child and \$34 per week for each additional child.

### **On ceasing to be part of a CDEP scheme**

Guidelines to deal with the eligibility of CDEP participants for the NSA when they cease to be involved in a CDEP scheme are set out in the Guide to the Social Security Act 1991, at Sections 12.2980B12.315, under the heading 'Community Development Employment Program'. These are administrative guidelines and do not have the force of legislation.

The guidelines state that an individual's reason for leaving a CDEP scheme must be examined. The NSA will be payable immediately if the person leaves the CDEP scheme for 'compelling personal reasons such as family or cultural issues'<sup>68</sup> A person will also be immediately eligible for the NSA if the person is receiving less than their NSA entitlement through participation in a CDEP scheme.<sup>69</sup>

Where a person ceases participation in their CDEP voluntarily for a reason that is not considered 'compelling', the NSA is not immediately payable because:

they have contributed to their own unemployment as suitable employment was available to them within the CDEP for the remainder of the quarter. These circumstances would particularly apply in remote communities where there is effectively no other labour market. At the end of the funding period, however, there would be no bar to the person receiving NSA under normal conditions.<sup>70</sup>

While there are some safeguards to ensure that CDEP participants receive at least the equivalent to the NSA entitlement, the DSS guidelines treat people ceasing to be part of a CDEP scheme generally as if they were leaving or refusing normal labour market-based employment. This means that CDEP participants who cease to be part of a CDEP for a reason that is not 'compelling' will have to wait

<sup>68</sup> Section 12.303, Guide to the *Social Security Act 1991*.

<sup>69</sup> As above.

<sup>70</sup> Section 12.306, Guide to the *Social Security Act 1991*.

till the end of the funding quarter before being eligible for the NSA. There is provision for the ordinary waiting period to be waived due to hardship.

## **Department of Employment, Education, Training and Youth Affairs treatment**

The Department of Employment, Education, Training and Youth Affairs (DEETYA)<sup>71</sup> administers a number of benefits and allowances. The relevant allowance for CDEP participants is ABSTUDY. The DEETYA also administers the pilot Work for the Dole scheme.

### **ABSTUDY**

ABSTUDY provides financial assistance to Indigenous students who are undertaking an accredited course of study at an approved educational institution. ABSTUDY is targeted at Indigenous people. AUSTUDY is targeted at non-Indigenous people.

ABSTUDY is an unlegislated scheme administered by DEETYA's Aboriginal Education Branch. Its administration is based on the '1995 ABSTUDY Policy Guidelines Manual' that has ministerial approval.

Many CDEP participants attend educational institutions. Before 1 July 1995, CDEP participants were treated as NSA recipients in relation to ABSTUDY. CDEP participants were unable to receive full-time ABSTUDY payments unless they ceased participation in their CDEP scheme. This is no longer the case.

In July 1995, Mr Volker, then Secretary, Department of Employment Education and Training (DEET), observed:

It could be argued that CDEP recipients should be treated as wage earners as they do not receive their income directly from the Commonwealth. The approach under ABSTUDY is to deny the living allowance to direct recipients of Commonwealth income support but, where the support is indirect, for example, paid to an employer under the training for Aboriginal and Torres Strait Islanders, the student is treated as a wage earner. DEET is considering the implications of treating the CDEP as a wage rather than a benefit.<sup>72</sup>

In light of this anomaly, the DEET began treating CDEP scheme income as indirect Commonwealth support and CDEP participants as wage recipients from 1 July 1995. Accordingly, CDEP participants who are attending an educational institution full-time while working part-time in a CDEP scheme are now judged by DEETYA to be eligible for ABSTUDY, provided they meet the other general eligibility requirements, such as the income test.<sup>73</sup>

A CDEP participant can claim ABSTUDY from DEETYA but a person already on ABSTUDY cannot become a CDEP participant. Under the guidelines set out in the ATSIIC Grants Manual, CDEP participants may qualify for ABSTUDY living allowance but a person who is already in receipt of the ABSTUDY living allowance is not eligible to receive NSA/YTA and is therefore not eligible to become a CDEP participant.

<sup>71</sup> The Department of Employment Education and Training (DEET) was restructured after the March 1996 election and the portfolio is now called the Department of Employment, Education, Training and Youth Affairs (DEETYA).

<sup>72</sup> Department of Employment Education and Training, *Submission No. 8*, p. 2.

<sup>73</sup> DEET Student Assistance Policy Circular, 1995/11, *Community Development Employment Projects (CDEP) Scheme Wage*.

## Work for the Dole

As noted in Chapter 2, a pilot Work for the Dole initiative commenced on 17 October 1997. To be eligible to participate, an individual must be receiving the NSA. The scheme is administered by the DEETYA. An individual remains an NSA recipient while participating in a Work for the Dole project.

CDEP participants are not eligible to participate in Work for the Dole projects.<sup>74</sup>

## Earning additional income while remaining on CDEP

Social security recipients are subject to limitations concerning how much additional income they can earn before their allowance is affected. Generally, CDEP participants receive more favourable treatment than NSA recipients in relation to earning additional income.

Currently, the ATSIIC guidelines state that each CDEP participant can earn a maximum gross weekly income of four times the remote APP rate. That is, twice the APP rate from their CDEP scheme and twice the APP rate from other sources.

If a participant is working full-time (in excess of 30 hours per week) that person can continue to be a CDEP participant if:

- their weekly full-time income is less than twice the weekly remote APP rate;
- the hours worked do not prevent the participant from performing CDEP work; and
- the CDEP does not have a waiting list of eligible participants.<sup>75</sup>

If a CDEP participant is classifiable as a permanent part-time worker, the individual can earn a maximum gross weekly income of up to twice the weekly remote APP rate from permanent part-time work outside the CDEP before becoming ineligible for CDEP wages.<sup>76</sup>

Accordingly, it is possible for CDEP participants to earn twice the remote APP rate, in addition to their CDEP wage, before becoming ineligible for CDEP.

In contrast, NSA recipients face an income test under which:

- payment is affected if their additional income is more than \$60 per fortnight;
- payment is reduced by 50 cents for each dollar of income between \$60 and \$140 per fortnight; and
- payment is reduced by 70 cents for each dollar of income over \$140 per fortnight.<sup>77</sup>

NSA recipients earning income from permanent part-time work also face the possibility of being no longer eligible for NSA because they are no longer considered to be unemployed.

<sup>74</sup> DEETYA, *Work for the Dole Pilot Project Handbook*, Commonwealth of Australia, 1997, p. 19.

<sup>75</sup> ATSIIC, *Funding Procedures Manual Pt II: Grant Procedures*, Division C, Chapter 1, p. 23.

<sup>76</sup> As above, p. 24.

<sup>77</sup> DSS, *Social Security Payment Rates 1 July – 19 September 1997*, (Pamphlet), p. 4.

## The Disability Support Pension

The ATSIC determines who is eligible to participate in a CDEP scheme. Eligibility is determined by whether an individual is eligible for the NSA, the Sole Parent Pension or the Youth Training Allowance. Persons receiving the Disability Support Pension are not eligible to participate in their local CDEP scheme.

The Disability Support Pension is a long-term income-support payment for people with disabilities.

Disability Support Pensioners are generally excluded from participating in CDEP schemes. In the DSS submission, the Department noted:

At present, communities are not funded by ATSIC to provide employment to people who are receiving the disability support pension. In remote communities the exclusion of DSP [disability support pension] recipients, results in an exclusion from the only locally accessible work. This Department is anxious to see the current obstacle to DSP recipients participation in CDEP removed and has been involved in discussions with ATSIC in an attempt to overcome this problem.<sup>78</sup>

Further, people with a disability who have undertaken training or rehabilitation provided by the DEETYA or the Department of Health and Family Services, as part of a program of assistance provided by the Disability Reform Package, are unable to obtain employment on CDEP projects.

Currently, the only DSS pensioners who can participate in the CDEP scheme are Sole Parent Pensioners. This is stated in Division C of ATSIC's *Funding Procedures Manual Part II*<sup>79</sup> The rationale for this restriction is not clear. Supporting Parent Pensioners are included in CDEP but Disability Support Pensioners and people with disabilities who have undertaken training or rehabilitation in the Disability Reform package context are excluded.<sup>80</sup> This issue is discussed further in Chapter 4.

### In summary

Table 7 summarises the treatment of CDEP income by the Department of Social Security, the Australian Taxation Office, the Department of Employment Education, Training and Youth Affairs and the Aboriginal and Torres Strait Islander Commission.

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<sup>78</sup> Department of Social Security, *Submission No. 10*, p. 4.

<sup>79</sup> ATSIC, *Funding Procedures Manual Part II: Grant Procedures*, Chapter 1, p. 20

<sup>80</sup> However, it should be noted that the ATSIC Funding Procedures Manual states that community members on other DSS pensions or benefits (other than Sole Parent Pension) who do not meet the eligibility criteria for inclusion on the participant schedule, can be paid from the recurrent component of the CDEP grant provided the grantee has funds for this in their approved budget (ATSIC, *Funding Procedures Manual*, Part II, Chapter 1, p. 21).

**Table 7: CDEP Income Classification and Disadvantage**

	<b>How is income from the CDEP scheme classified</b>	<b>Does this treatment materially advantage or disadvantage a CDEP participant</b>
<b>Department of Social Security</b>		
New Start Allowance	employment program	Disadvantages
Rent Assistance	employment program	Disadvantages
Parenting Allowance	employment program	Disadvantages
Mobility Allowance	unclear	Advantages, CDEP participants are eligible
Telephone Allowance	unclear	Disadvantages
Pharmaceutical Allowance	Non-DSS customers	Disadvantages
Pensioner Concession Card	wage earner	Disadvantages
Health Care Card	DSS customer	Advantages
<b>Australian Taxation Office</b>	wages	Disadvantages, CDEP income is assessable income and the beneficial rebate is not available as with the NSA
<b>Aboriginal and Torres Strait Islander Commissioner</b>	No defined status although would prefer CDEP income to be uniformly classified as wage income	Advantages, as greater additional income can be earned in comparison with NSA recipients
<b>Department of Employment, Education, Training and Youth Affairs</b>		
ABSTUDY	(low income) wages	Advantages, as treatment creates an entitlement
Work for the Dole	unclear	Disadvantages, no entitlement

## Notes

- Disadvantage and advantage have been generally determined on the basis of whether an entitlement is affected by the manner in which the service delivery agency classifies CDEP scheme income.
- In some cases, the classification of CDEP income is unclear or indistinct and disadvantage or advantage is determined on the basis of entitlement alone.

## Chapter 4: The CDEP scheme and human rights law

### Introduction

This chapter sets out the human rights standards relevant to the CDEP scheme and applies these principles to the CDEP scheme itself. The treatment of CDEP scheme participants by the Commonwealth government is dealt with in Chapter 5.

### Application of the Racial Discrimination Act

CDEP schemes are restricted to Indigenous communities. To be eligible to participate in a CDEP scheme one must be accepted as a member of an Aboriginal or Torres Strait Islander community. Non-Indigenous people (except in limited circumstances)<sup>81</sup> are excluded from participating in CDEP schemes. Accordingly, the human rights standard most relevant is racial non-discrimination.

The *Racial Discrimination Act 1975* (RDA) is a Commonwealth statute that prohibits racial discrimination. The RDA implements into Australian law some of the Commonwealth of Australia's obligations under the *International Convention on the Elimination of All Forms of Racial Discrimination* (CERD).

The CDEP scheme is a Commonwealth program. As noted earlier, the CDEP scheme is unlegislated. This means that the RDA applies to the operation of the CDEP scheme. Accordingly, if any aspect of the administration of the CDEP scheme program is racially discriminatory it will be unlawful under the RDA.

There are legislative provisions that affect CDEP participants, for example, section 614A of the Social Security Act and provisions of the Income Tax Assessment Act that determine the eligibility of CDEP participants to various rebates. It is a feature of Australian constitutional law that the Parliament cannot fetter its future legislative activity by ordinary legislation. This means that subsequent specific enactments will override earlier general enactments. All of the legislative provisions that affect CDEP participants are subsequent specific enactments to the RDA. Accordingly, if any issue of racial discrimination arises in the treatment of CDEP participants under Commonwealth legislation enacted after 1975, that treatment cannot be dealt with under the RDA.

### International obligations

The principle of racial non-discrimination is contained in all major human rights treaties and declarations.<sup>82</sup> As mentioned earlier, the Commonwealth of Australia is a party to the CERD. Significantly, the definitions of racial discrimination and 'special measures' are the same in the CERD and the RDA.

The Commonwealth has ratified article 14 of the CERD. Article 14 of the CERD is a complaint mechanism and allows an individual or a group to make a complaint to the United Nations Committee on the Elimination of Racial Discrimination (CERD Committee) if rights under the Convention have been breached and there is no adequate remedy within Australian law. Australia has

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<sup>81</sup> Non-Indigenous individuals who are 'accepted' as part of an Indigenous community can participate in that community's CDEP scheme. It is left to the CDEP scheme organisation to determine who is an 'accepted' member of the community. Typically, non-Indigenous people who are eligible to participate in CDEP schemes will be in a relationship with an Indigenous person or be a long term resident of the community.

<sup>82</sup> For example: Universal Declaration of Human Rights, Articles 2, 7 & 17; International Covenant on Civil and Political Rights, Articles 2, 26 & 27; Proclamation of Tehran, Item 1; International Convention on the Elimination of All Forms of Racial Discrimination, Article 2; Convention on the Rights of the Child, Article 2.



also ratified the *First Optional Protocol* under the *International Covenant on Civil and Political Rights* (ICCPR). The ICCPR also contains a provision dealing with non-discrimination and a breach of the principle of non-discrimination in Commonwealth legislation could also give rise to a 'communication' under the *Optional Protocol* procedures of the ICCPR.<sup>83</sup> Accordingly, there are issues of compliance with international treaty obligations in relation to Commonwealth legislation dealing with CDEP participants.

## **Racial discrimination**

The CERD defines racial discrimination in article 1(1) as:

any distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

The definition of racial discrimination, at section 9 of the RDA, replicates the article 1(1) of racial discrimination with some very minor rewording.

The international definition of racial discrimination is generally considered to have two elements. First, 'a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin' is required. Second, the measure based on race must nullify or impair 'the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.' This second requirement is generally taken to require that any racially specific measure must be able to be characterised as detrimental to the racial group in question.

Article 5 of the CERD lists some of the 'rights' that are relevant in assessing whether discrimination has occurred. One of the rights listed in article 5 of the CERD is:

The right to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration.

## **Racial discrimination and 'special measures'**

One feature of the CERD and the RDA is that both allow positive action to be taken that assists disadvantaged racial groups. Such positive measures are called 'special measures'. The rationale for allowing 'special measures' is that historical patterns of racism entrench disadvantage and more than the prohibition of racial discrimination is required to overcome the resulting racial inequality.

Article 1(4) of the CERD states:

Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however,

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<sup>83</sup> Under the First Optional Protocol to the ICCPR individuals can make 'communications' to the United Nations Human Rights Committee in relation to allegations that their rights under the ICCPR have not been respected. The Commonwealth Attorney-General's Department has produced a pamphlet titled *Individual Complaints to the United Nations*. A copy of this pamphlet can be obtained by calling the International Human Rights Branch of the Attorney-General's Department, telephone number (02) 6250 5634.

that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

‘Special measures’ benefit one racial group. The sanctioning of ‘special measures’ permits governments to lawfully initiate racially specific programs designed to assist disadvantaged racial groups. For example, an employment or training program targeted at a racial group with a history of poor labour market outcomes could be classified as a ‘special measure’. ‘Special measures’ do not constitute unlawful racial discrimination. This does not mean special measures are the only way that distinctions based on race can be lawfully maintained.

## **Racial discrimination and reasonable differentiation**

The CERD permits reasonable differentiation on the basis of race. It is widely accepted that the principle of non-discrimination is concerned with substantive equality rather than formal equality as ‘the principle of equality of individuals under international law does not require a mere formal or mathematical equality but a substantial and genuine equality in fact.’<sup>84</sup> All differences in treatment are not discriminatory. Equality does not mean identical treatment without regard to concrete circumstances.

A distinction will not be discriminatory if the objective of the distinction is legitimate and reflects the circumstances of the racial group in question. The CERD Committee in its general recommendation XXIV observed:

1. Non-discrimination, together with equality before the law and equal protection of the law without any discrimination constitutes a basic principle in the protection of human rights ...
2. The Committee observes that a **differentiation of treatment will not constitute discrimination if the criteria for such differentiation, judged against the objectives and purposes of the Convention, are legitimate** (emphasis added) or fall within the scope of article 1, paragraph 4 (special measures) of the Convention. In considering the criteria that may have been employed, the Committee will acknowledge that particular actions may have varied purposes. In seeking to determine whether an action has an effect contrary to the Convention, it will look to see whether that action has an unjustifiable, disparate impact upon a group distinguished by race, colour, descent, or national or ethnic origin.<sup>85</sup>

Significantly, the CERD Committee in this general recommendation clearly states that differential treatment, if appropriate, does not constitute racial discrimination and does not have to be a ‘special measure’. This possibility is important as there may be differential practices that are adapted to the circumstances of a particular racial group but are not able to be characterised as ‘special measures’.

On 18 August 1997, the CERD Committee adopted a general recommendation concerning Indigenous people.<sup>86</sup> The Committee noted that the provisions of the CERD apply to Indigenous peoples and ‘that in many regions of the world Indigenous peoples have been, and still are being, discriminated against.’<sup>87</sup> The Committee in this general recommendation addressed the relationship between Indigenous peoples’ distinct situation within the State and racial discrimination law.

<sup>84</sup> McKean, W., *Equality and Discrimination under International Law*, Oxford University Press, 1983, p.288.

<sup>85</sup> *Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.(1994), p68.

<sup>86</sup> *Committee on the Elimination of All Forms of Racial Discrimination*, CERD/C/51/Misc.13/Rev.4, (1997), p.2.

<sup>87</sup> As above, p.1.

Generally, the Committee called on States Parties to the CERD to respect the distinct culture, history, language and way of life of Indigenous peoples. Of relevance to government programs such as the CDEP scheme, the Committee explicitly called on States Parties to the CERD to ‘provide Indigenous peoples with conditions allowing for sustainable economic and social development compatible with their cultural characteristics.’<sup>88</sup>

## **Recent comments from the High Court**

In Australia, the issue of what constitutes racial discrimination and reasonable differentiation based on race has been raised in the context of native title and the Native Title Act 1993. In *Western Australia v Commonwealth*, the State of Western Australia challenged the constitutional validity of the Native Title Act. The State of Western Australia argued that the provisions of the Native Title Act that advantaged native title claimants constituted unlawful racial discrimination. The High Court rejected this submission. While the High Court did not make any definitive pronouncement concerning the relationship between the Native Title Act and racial discrimination law, it is worth noting that the Court did not assume that a racially specific measure such as the Native Title Act must be either a special measure or constitute discrimination. In *WA v Commonwealth*<sup>89</sup> the High Court observed ‘the Native Title Act can be regarded as either a special measure under the RDA or a law which, though it makes racial distinctions, is not racially discriminatory’.<sup>90</sup>

## **Does the CDEP scheme breach federal human rights law?**

The CDEP scheme is designed to apply only to Aboriginal and Torres Strait Islander people. Accordingly, the CDEP scheme is race based and there is an issue as to whether the scheme complies with the principles of the RDA.

The fact that the CDEP scheme applies to one racial group does not mean that it necessarily constitutes racial discrimination. The definition of racial discrimination requires that a race based measure is detrimental to the racial group in question. Additionally, racial discrimination law allows special measures and reasonable differentiation on the basis of race according to the concrete circumstances of a racial minority.

While the issue of whether the CDEP scheme program is a ‘special measure’ or a form of reasonable differentiation is properly an issue for the courts, the CDEP scheme does not appear to raise any significant issue of racial discrimination.

There are a number of features of the CDEP scheme that support this interpretation.

First, the CDEP scheme is designed to deal with disadvantage experienced by Indigenous communities in their access to social security and mainstream labour market programs and opportunities. The first official CDEP schemes were initiated in response to the poor labour market outcomes for Indigenous people exposed by the 1976 Interdepartmental Working Party report and one of the enduring objectives of the CDEP scheme is to provide labour market opportunities for Indigenous communities. The CDEP scheme further seeks to deal with the fact that many Indigenous communities have disadvantaged access to the social security system. The purpose of the CDEP scheme is to enhance the exercise, on an equal footing, of relevant economic, social and cultural rights of Indigenous peoples. The program is beneficial in nature and contains elements that could be described as a ‘special measure’ under the RDA and the CERD.

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<sup>88</sup> As above, p.2.

<sup>89</sup> (1995) 183 CLR 373.

<sup>90</sup> (1995) 183 CLR 373 at 483.

Second, the program does not disadvantage non-Indigenous people. This is important, as one of the distinguishing features of a non-discriminatory, race based measure is that the measure has no ‘unjustifiable disparate impact upon a group distinguished by race, colour, descent, or national or ethnic origin.’<sup>91</sup>

Third, the program is adapted to the concrete circumstances of Indigenous communities. For example, the CDEP scheme assists in overcoming difficulties arising out of the remote location of many Indigenous communities. The fact that there is no equivalent scheme for non-Indigenous people reflects the fact that non-Indigenous people do not encounter the same geographic and other barriers to participation experienced by Indigenous people. Non-Indigenous people generally enjoy relatively easy access to the Australia’s social security system and labour market programs. The expansion of the CDEP scheme into non-remote areas in the 1980s undermines this argument. Despite this there are still features of Indigenous communities, both remote and non-remote, that create special needs served by the CDEP scheme.

From the perspective of discrimination law, the CDEP scheme program is similar to ABSTUDY; it is a program targeted at Indigenous people that acknowledges their special needs.

There are, nevertheless, some specific concerns relating to the administration of the CDEP scheme by the ATSIIC. These concerns relate to the absence of appeal rights and the exclusion from eligibility of Disability Support Pensioners.

### **Absence of appeal rights**

There is an absence of defined appeal rights for CDEP communities and CDEP participants. As earlier stated, the CDEP scheme is unlegislated. The absence of legislation limits the appeal rights of CDEP communities and CDEP participants.

Social security recipients have access to a legislated system of merits review through the Social Security Appeals Tribunal. In comparison, there is no defined system of merits review available to CDEP communities and participants. There is no dedicated system of review in the ATSIIC guidelines under which the CDEP scheme is administered. Further, the general administrative law remedies available under the *Administrative Decisions (Judicial Review) Act 1977* cannot be employed as there is no ‘enactment’ to attract the operation of the Act.

The only form of review open to CDEP communities and participants, who wish to challenge a decision of the ATSIIC, are the common law prerogative writs. Review by use of prerogative writs such as *mandamus*<sup>92</sup> and *prohibition*<sup>93</sup> requires the taking of action, generally in the Federal Court, and is cumbersome and expensive.

One of the main rights that non-discrimination law seeks to safeguard is equality before the law. For example, article 5 of the CERD expressly states that the impact of a practice on equality before the law and ‘[T]he right to equal treatment before the tribunals and all other organs administering justice’ is relevant when considering whether a practice is racially discriminatory.

Further, systems of review provide an accountability mechanism whereby the users of government programs can have an input into how the program is administered. Review mechanisms also assist *in*

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<sup>91</sup> *Report of the Committee on the Elimination of All Forms of Racial Discrimination*, Official Records of the General Assembly, Forty-Eighth Session, Supplement No 18 (A/48/18). p. 115.

<sup>92</sup> An application to compel a minister or government body to make a decision or perform a public duty.

<sup>93</sup> An application to restrain a minister or government body from acting illegally.

the development and maintenance of policies and procedures that are appropriate to changing circumstances.

The ATSIIC informed the Commission that in response to the 1996 *Review of ATSIIC's processes for decision making and the reconsideration of decisions*, a complaint and review unit was established in the ATSIIC's Central Office. The Central Office Complaints and Review Unit will initially be limited to complaints and requests for review from the ATSIIC's external clients. A more comprehensive State Office Complaint and Review Unit is being trialed in New South Wales.

The ATSIIC is urged to implement of a system of merits review for CDEP communities and participants as a matter of high priority.

***Recommendation - review rights***

That the ATSIIC implement a system of merits review for CDEP communities and participants as a matter of high priority.

**Disability discrimination issue**

As discussed in Chapter 3, those receiving the Disability Support Pension are excluded from participating in their local CDEP scheme. Sole Parent Pensioners are not excluded. The exclusion of Disability Support Pensioners is not about 'double dipping' and relates to eligibility. Under current CDEP guidelines, a Disability Support Pensioner cannot forgo his or her pension and receive an income through their local CDEP scheme.

The relevant human right is the right to not be discriminated against on the basis of disability. The *Disability Discrimination Act 1992* outlaws discrimination on the grounds of disability.

The Disability Discrimination Act does apply to the exclusion of Disability Support Pensioners as the exclusion is based on the administrative practice of the ATSIIC and not legislation. The exclusion in its current form raises an issue as to whether it is consistent with the Disability Discrimination Act.

The ATSIIC is urged to review the exclusion of Disability Support Pension recipients from CDEP schemes as a matter of high priority.

***Recommendation - Disability Support Pensioners***

That the ATSIIC review the exclusion of Disability Support Pension recipients from CDEP schemes as a matter of high priority.

**Chapter 5: The treatment of CDEP participants and racial discrimination law**

**Commonwealth legislation and this inquiry**

Some of the matters discussed in this chapter refer to 'treatment' under Commonwealth legislation. As noted in Chapter 4, the treatment of CDEP participants by Commonwealth legislation is not covered by the RDA. For example, the Department of Social Security's treatment of CDEP participants is dictated largely by section 614A of the Social Security Act. Any issue of discrimination arising out of section 614A could not be the subject of a valid complaint under the RDA.

In Australia, human rights standards such as non-discrimination derive from treaty obligations assumed by the Commonwealth of Australia.<sup>94</sup> Accordingly, the compliance of Commonwealth legislation with the standard of non-discrimination is a serious issue.

The examination of the human rights implications of 'enactments' is a statutory function given to the Human Rights and Equal Opportunity Commission by the Commonwealth Parliament.<sup>95</sup> Further, the terms of reference for this particular inquiry demand that legislation dealing with the CDEP scheme be appraised in terms of its discriminatory impact.

### **Lack of consistency in treatment**

One of the findings of this inquiry is that there is a lack of consistency in the treatment of CDEP participants by Commonwealth Departments and Agencies. The Australian Taxation Office treats CDEP participants as ordinary wage-earners and taxes CDEP earnings. The DSS treats CDEP participants as being in a 'Commonwealth funded employment program' and denies CDEP participants access to the NSA and a wide range of associated benefits. The DEETYA treats CDEP participants as wage earners and allows CDEP participants access to ABSTUDY.

The ATSIC in correspondence with the Race Discrimination Commissioner identified section 614A of the Social Security Act, the legislative bar, as the main source of difficulty in relation to the treatment of CDEP participants.

The ATSIC noted:

It is generally acknowledged that CDEP participants are disadvantaged when their access to social security entitlements are compared with both low income earners and NSA recipients. It is also equally evident that this disadvantage is directly attributable to the legislative bar in the Social Security Act which renders CDEP participants ineligible for NSA. ATSIC accepts that there is a high level of resistance to any proposal to lift the legislative bar within the Government because of the perception of 'double dipping'. However it is ATSIC's view that it is the legislative bar that seriously disadvantages CDEP participants and that it is incumbent on all parties to find an equitable solution to this dilemma. ATSIC is committed to continuing to work with DSS, DEETYA and other relevant Government departments and agencies to achieve that objective.<sup>96</sup>

The ATSIC further noted that CDEP organisation and most government agencies recognise CDEP participants as 'employed':

CDEP participants consider themselves to be employed and are treated as employees by CDEP organisations, the Industrial Relations Commission, the Australian Taxation Office, the Department of Industrial Relations, the Department of Employment, Education, Training and Youth Affairs, State and Territory Governments in relation to workers' compensation and, most importantly, by the Commonwealth Government in its unemployment statistics.<sup>97</sup>

The DSS defended its categorisation of the program as a 'Commonwealth funded employment program'. In correspondence with the Race Discrimination Commissioner, the DSS noted:

<sup>94</sup> *Koorwarta v Bjelke-Petersen* (1982) 153 CLR 168.

<sup>95</sup> Sub-section 11(e), *Human Rights and Equal Opportunity Act 1986*.

<sup>96</sup> ATSIC, *Correspondence*, 6 May 1997, p. 2.

<sup>97</sup> As above, p. 3.

At the time of the 1991 legislative amendments, it was recognised that the ATSIC make available through its funding formulae, funds which incorporate a minimum payment, equivalent to NSA, for all participants, as a starting point. It was considered that this payment was in lieu of NSA and therefore, it would be considered 'double dipping' to allow access to NSA as well. The multiple entitlement exclusion in Section 614A recognises this funding as the basis of ATSIC's Average Per Participant (APP) rate, which is used to calculate CDEP funding to communities. It was also recognised that CDEP communities are funded over and above the 'pooled' NSA payments by way of administration and capital funding to encourage people to establish businesses and increase employment opportunities, as well as providing a minimum income. In this spirit, CDEP participants are able to earn over twice the APP rate of \$328.10 per fortnight or \$364.30 in remote areas, outside the CDEP, and still be eligible to receive the full APP rate. In contrast, NSA recipients have an income test free area of \$60.00 per fortnight. In DSS' view, this renders the scheme far more than just an income support scheme and notes that it is described in the Act as a Commonwealth funded employment program. ... The philosophical basis of the scheme is to assist unemployed Indigenous Australians in their move away from welfare dependency towards self reliance, a view supported by both the current and previous governments.<sup>98</sup>

## Income inequalities

While there are upper limits to the amount of income CDEP participants can receive, there is no lower limit. Accordingly, it is possible, if no work is available or done, to earn significantly below the NSA entitlement while participating in a CDEP scheme. As noted in Chapter 2, CDEP schemes are structured so as to produce income inequalities between participants.

According to the DSS, 6% of CDEP scheme participants receive a so-called 'sit-down' wage of approximately \$60.00 per fortnight.<sup>99</sup> This is significantly below the NSA entitlement. The DSS noted, 16% of CDEP scheme participants receive equal to their NSA entitlement or less.<sup>100</sup> It should be noted that due to the inabilities of CDEP participants to receive additional allowances and 'add-ons' such as the Pensioner Concession Card, this group is further disadvantaged in comparison with NSA recipients.

The capacity exists for CDEP participants to receive significantly more than their NSA entitlement and the National Aboriginal and Torres Strait Islander Survey in 1994 found that 10% of CDEP participants received more than \$25,000 per annum.

The issue of a minimum income for CDEP scheme participants confronted the 1991 Interdepartmental Review of Administration. The Review observed:

that some protection to people who are not offered sufficient work should be available through the unemployment benefit system. Should dual payments of CDEP wages and partial UB [unemployment benefits] be legislatively barred, it should be possible for a person who is disadvantaged by not being offered sufficient work to decline participation in CDEP and receive UB without penalty.<sup>101</sup>

<sup>98</sup> DSS, *Correspondence*, 23 June 1997, p. 2.

<sup>99</sup> As above, p.3.

<sup>100</sup> As above, p. 3.

<sup>101</sup> ATSIC, *Community Development Employment Projects: Interdepartmental Review of Administration*, June 1991, p. 46.

More recently, some of the income problems associated with the CDEP scheme have been highlighted in a report of the Commonwealth Ombudsman, *One size does not fit all*. This report concerned the Department of Social Security's service delivery to Aboriginal persons living in the town camps of Alice Springs. In *One size does not fit all*,<sup>102</sup> the Commonwealth Ombudsman found that up to 40% of Alice Springs Aboriginal people living in town camps received insufficient income support.<sup>103</sup>

The Commonwealth Ombudsman observed that one of the main reasons for insufficient income among Aboriginal town camp dwellers is the absence of a minimum income guaranteed by CDEP schemes. The Ombudsman noted:

People can be on CDEP and only receive \$40 per week 'sit down' money when no work is performed. ... In 1995, 300 CDEP workers in Alice Springs earned taxable incomes of less than \$6,000. CDEP is causing severe poverty traps for some Aboriginal people. This is a product of the design of CDEP and the distribution of work and available funds by some participating organisations.<sup>104</sup>

The DSS noted that comparisons between CDEP income and entitlements under the Social Security Act are difficult to make and that any comparison of CDEP participant income and NSA income needs to consider the 'broader context'. The DSS noted:

In terms of the broader context, DSS sees issues in relation to some CDEP participants receiving incomes significantly lower than they would be entitled to under DSS income support programs because of the ways CDEP is managed in communities. Furthermore, DSS is concerned to ensure that there is equity between the 'basket' of assistance available under CDEP and equivalent benefits available to DSS customers. In this context, we are concerned about comparisons being made between the income support elements of the broader package in isolation.<sup>105</sup>

## **The issue of 'choice' and the voluntariness of participation in a CDEP scheme**

One of the foundations of the CDEP scheme is that it is based on a choice by an Indigenous community to forgo unemployment benefits and pool their entitlements for the benefit of the community. While the formal connection with unemployment benefits has been notionally severed by the introduction of the APP rate, the fact that CDEP is an alternative to unemployment benefits is still an important feature of the program and a source of confusion about what CDEP is. Colloquially the CDEP scheme is often referred to as the 'Aboriginal work for the dole scheme'.

The DSS stated that it is inappropriate to compare CDEP entitlements with NSA entitlements, as recipients have 'a choice between joining their local CDEP scheme or claiming NSA and [Indigenous people] exercise this choice, as demonstrated by the fact that DSS has some 92,000 Aboriginal and Torres Strait Islander customers, many of whom are NSA and Youth Training Allowance recipients, as compared with the 30,000 CDEP participants.'<sup>106</sup>

It should be noted that the current DSS guidelines dealing with the eligibility of CDEP participants for NSA on ceasing to be part of a CDEP scheme are ambiguous. The guidelines state that if a

<sup>102</sup> Commonwealth Ombudsman, *One size does not fit all*, August 1997.

<sup>103</sup> As above, p. 16.

<sup>104</sup> As above, p. 19.

<sup>105</sup> DSS, *Correspondence*, 23 June 1997, p. 3.

<sup>106</sup> DSS, *Correspondence*, 23 June 1997, p. 2.



person ceases to participate in their CDEP scheme voluntarily and for no ‘compelling reason’, they are treated as if they have left paid employment voluntarily and must wait the exclusion period before being eligible for NSA. Alternatively, the guidelines state that if a CDEP participant leaves the CDEP scheme because of insufficient income they are immediately eligible for NSA.

In the Ombudsman report *One size does not fit all*, difficulty in transferring between CDEP schemes and DSS benefits was identified as contributing to insufficient income among Aboriginal people living in the vicinity of Alice Springs. The Ombudsman noted that because of the volume of ‘transfers’ there ‘was a high risk of periods of no income for many people when they fall between the two income support systems’.<sup>107</sup> More generally, the Ombudsman in *One size does not fit all* concluded that ‘the current design of social welfare entitlements is clearly not appropriate to the needs of many Aboriginal people’ in terms of service delivery mechanisms and life style expectations.<sup>108</sup>

According to information received as a result of consultations with State and Territory ATSIC offices and Indigenous communities, there was until recently a widespread practice of ‘all of us in or none of us in’ in many Indigenous communities in relation to CDEP participation. Accordingly, there was some compulsion for individuals to participate in their local CDEP scheme as the decision was a community decision. This practice of ‘all or none’ has apparently lessened in the last five years, although it persists in some remote communities.

It is likely that there are a number of subtle forms of compulsion that operate on an individual in making the decision to participate in a local CDEP scheme or receive a DSS allowance. A number of these factors are desirable and inevitable, such as pride in one’s community and, for want of a better term, peer group pressure. The notion of a free choice between CDEP scheme participation and receiving a DSS allowance may therefore not be real due to the political and geographical characteristics of Indigenous communities.

## **Chapter 6: Conclusion**

### **Comparability**

The CDEP scheme is unique and herein lie the difficulties that the scheme poses as a racial discrimination issue. No other government benefit or program is readily comparable with the CDEP scheme.

In many respects, the CDEP scheme functions on a number of levels. The program achieves certain outcomes for Indigenous communities. It makes some remote communities viable when they otherwise might not be and it contributes to the maintenance of semi-traditional lifestyles and residence ‘on country’.

CDEP schemes vary greatly across Australia in the activities pursued and the outcomes for participants and communities.

For governments, the CDEP scheme program provides a ‘link’ with Indigenous communities. There are positive and negative aspects to this. The CDEP scheme provides a delivery mechanism for communities that, for a range of reasons, pose service delivery problems for governments. The scheme also substitutes for services that are the responsibility of governments to provide.

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<sup>107</sup> Commonwealth Ombudsman, *One size does not fit all*, August 1997, p. 19.

<sup>108</sup> As above, p. 27.

While CDEP participants can be viewed as disadvantaged in comparison with NSA recipients, in access to the social security system, there are features of the CDEP scheme that balance these disadvantages. For example, many CDEP participants earn significantly more than NSA recipients and remain eligible for payment in their local CDEP scheme.

### **Work for the Dole**

The status of CDEP participants is further complicated by the introduction of a pilot Work for the Dole scheme. The pilot is being conducted under legislation<sup>109</sup> and involves participants remaining NSA recipients while working on community projects as part of their NSA activity agreement.

While CDEP participants will not be able to participate in Work for the Dole projects, the official *Work for the Dole Pilot B Project Handbook* observes ‘CDEP communities may submit a Work for the Dole proposal, provided that it is and will be maintained separately from any other CDEP projects that they may be managing. Participants may then be drawn from other members of the local community.’<sup>110</sup> The potential for widespread Work for the Dole projects adds significant complexity and presents Indigenous communities with a choice as to whether to participate in a Work for the Dole project or a CDEP scheme. If the Work for the Dole pilot proves a success and is implemented nationally, it has the potential to be a source of competition for CDEP schemes.

From a practical perspective, CDEP schemes have a number of advantages over the proposed Work for the Dole initiative. These advantages relate to the capacity while in a CDEP scheme to earn additional and higher income, and the absence of a requirement to actively look for work. Work for the Dole participants will still be classified as ‘unemployed’ and required to actively seek employment. Work for the Dole participants remain ‘customers’ of the DSS and eligible for all the allowances and concessions that this status brings.

One feature of Work for the Dole projects is that they are not intended as a solution to long-term unemployment or associated social problems. The stated aim of the Work for the Dole scheme is the fostering of positive work attitudes and not the alleviation of specific access problems associated with unemployment. As the, then Minister for Schools and Vocational Training, the Hon Dr David Kemp MP, observed:

The value of the Work for the Dole initiative lies in bringing young unemployed people back into a work culture to help instil a positive attitude to work. It will give young people a chance to engage with the community rather than being alienated from it.<sup>111</sup>

### **Areas of concern**

There are identifiable concerns arising out of the CDEP’s schemes structure. These are:

- the lack of access to the CDEP scheme by people with disabilities;
- the absence of a guaranteed minimum income for CDEP participants;
- the lack of adequate review mechanisms; and
- the lack of consistency in the treatment of CDEP participants by the Commonwealth Government.

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<sup>109</sup> Social Security Legislation Amendment (Work for the Dole) Act 1997.

<sup>110</sup> DEETYA, *Work for the Dole - Pilot Project Handbook*, Commonwealth of Australia, 1997, p. 19.

<sup>111</sup> The Hon Dr David Kemp MP, Second Reading Speech, Social Security Legislation Amendment (Work for the Dole) Bill 1997, p. 1.

Some of these concerns are balanced by other legitimate objectives of the CDEP scheme program. For example, the lack of a minimum guaranteed income is balanced by the need to provide an incentive to work and by the fact that many CDEP participants receive incomes higher than that available through the NSA. Similarly, the absence of appeal rights is primarily a consequence of the fact that the CDEP scheme is unlegislated. The lack of rigid legislative parameters for CDEP schemes is a feature of the program's success as it has allowed CDEP schemes to be 'user friendly' for participating Indigenous communities. The exclusion of Disability Support Pensioners from eligibility in CDEP schemes does not appear to have any justification.

Despite the complexity of the equity issues associated with the CDEP scheme, there are some matters that raise substantial concern about racial discrimination. The lack of consistency in the treatment of CDEP participants is an issue that is significant and requires urgent attention.

### **The worst of all worlds**

In a number of situations, CDEP participants appear to experience the worst of all worlds in their treatment by some Commonwealth bodies. For taxation purposes, CDEP income is treated as ordinary wage income and if a CDEP participant earns above the tax-free threshold, tax will be payable. Conversely, if a CDEP participant earns a minimum income through a CDEP scheme, that individual is unable to access the NSA to 'top up' his or her income as other low income wage earners can who are looking for full-time work.

These difficulties are mainly due to the DSS's classification of the CDEP scheme as a 'Commonwealth funded employment program'. Section 614A of the Social Security Act denies CDEP participants access to NSA. As noted by the ATSIIC, the treatment of CDEP participants by the DSS is exceptional as all other government agencies treat CDEP participants as wage-earners.

### **Should CDEP participants be uniformly treated as wage-earners?**

The appropriateness of the DSS classification of the CDEP scheme as a 'Commonwealth funded employment program' is questionable.

CDEP participants pay tax. Generally, low income earners who are searching for full-time work are eligible for the NSA. Because the CDEP scheme is classified as a 'Commonwealth funded employment program', CDEP participants are denied access to the NSA as a means of income support. Uniformly classifying CDEP participants as wage earners would be one way to remedy this situation.

CDEP participants' wages are not paid by the Government but by the relevant CDEP organisation. Therefore CDEP participants do not receive their income directly from the government.

In many Indigenous communities, the CDEP scheme is not a transitional program but represents the only real work available. Many individuals will only ever obtain permanent employment through a CDEP scheme. Further, in many remote and rural areas the local CDEP scheme provides 'citizenship' services to Indigenous people. That is, services and facilities generally delivered by governments and not charged for directly, such as road maintenance and access to clean water. Accordingly, there are compelling reasons to acknowledge that CDEP is 'real work'.

There is a significant number of CDEP participants who receive well below their social security entitlement and the APP rate. The legislative bar means that this group cannot access 'top-up' unemployment benefits even if they are looking for full-time employment.

The current legislative arrangements appear to create a number of disincentives to participation in CDEP schemes. For example, the current arrangements for Parenting Allowance and CDEP may hinder Indigenous women's involvement in their local CDEP scheme.

## Conclusion

The CDEP scheme funds Indigenous community organisations to provide work to individuals so that they have the opportunity to earn at least the equivalent of the APP rate. However, because of the application of the 'no work, no pay' rule in many CDEP communities, some participants receive very low incomes or no income at all. The recently released Commonwealth Ombudsman report, *One size does not fit all*, has described some of the relevant income issues in the context of Aboriginal town camp-dwellers around Alice Springs.

The fact that the CDEP scheme is voluntary is important. If an Indigenous person is unemployed, he or she has a choice as to whether to participate in the local CDEP scheme or receive NSA. In a formal sense, Indigenous people are not denied access to the social security system although due to the location of many Indigenous communities and expectations placed on individuals, there may not always be the reality of a true choice.

The lack of uniformity in the administrative treatment of CDEP participants by Commonwealth Departments and agencies raises concern about discrimination and equality of treatment. Essentially, CDEP participants should be treated uniformly so as to avoid the perception or possibility of discrimination.

The Government should treat CDEP participants uniformly as ordinary wage-earners. One practical result of this change is that section 614A of the Social Security Act requires some amendment. If the legislative bar were removed, CDEP participants would not immediately gain access to the NSA or what is colloquially referred to as 'top-up'. CDEP participants would still have to satisfy all the other eligibility criteria of the NSA.

It is noted that the ATSIC and the DSS are currently working closely together so as to address the income and equity issues arising out of the interaction between the CDEP scheme and the social security system.

### **Recommendation**

That the Commonwealth Government treat CDEP participants uniformly as ordinary wage earners. Consideration should be given to the effect that section 614A of the Social Security Act has on CDEP participants.

### **Recommendation**

That the ATSIC implement a system of merits review for CDEP communities and participants as a matter of high priority.

### **Recommendation**

That the ATSIC review the exclusion of Disability Support Pension recipients from CDEP schemes as a matter of high priority.

## **Appendix 1: Persons and organisations who made submissions to the Inquiry**

Mr Alan Harris, GRIFFITH ACT

Department of Planning and Development  
Victorian Government, MELBOURNE VIC

Department of Housing and Local Government  
Northern Territory Government, DARWIN NT

Department of Local Government and Co-operatives  
New South Wales Government, BANKSTOWN NSW

Department of Urban Services  
Australian Capital Territory Government, CANBERRA ACT

Department of Family and Community Services  
South Australian Government, ADELAIDE SA

Department of Environment and Land Management  
Tasmanian Government, HOBART TAS

Department of Employment Education and Training  
Commonwealth Government, CANBERRA ACT

Department of Housing and Urban Development  
South Australian Government, ADELAIDE SA

Department of Social Security  
Commonwealth Government, CANBERRA ACT

Aboriginal and Torres Strait Islander Commission  
Commonwealth Government, CANBERRA ACT

Australian Taxation Office  
Commonwealth Government, CANBERRA ACT

Department of Housing and Local Government and Planning  
Queensland Government, BRISBANE QLD

## **Appendix 2: Original community development employment projects basic outline and guidelines**

[As tabled in the House of Representatives, 26 May 1977.]

### **Factors which led to the development of the program**

1. High unemployment among Aboriginals living in remote areas or as separate communities where normal job opportunities are inadequate.
2. The resultant inactivity from unemployment, coupled with the payment of unemployment benefit, has led or contributed to deleterious social effects within the communities including:
  - adverse attitudes of Aboriginal men to work;
  - severe drunkenness and associated violence;
  - health hazards, and child neglect which occurs because some parents use their unemployment benefit for alcohol instead of food and clothing; and
  - acute juvenile delinquency.

3. Requests have been made by communities to the Minister and Department to provide work instead of unemployment benefits. Certain communities have refused to accept unemployment benefits but face increasing pressure to accept it as a source of cash income.
4. Large imbalances in income being received by Aboriginals in remote or separate communities:
  - among regions;
  - among communities; and
  - among individual Aboriginals within communities.

### **Objectives of the pilot program**

5. To provide employment opportunities thereby reducing the need for unemployment benefit for unemployed Aboriginals within the community at a cost approximating unemployment benefits.
6. To include in the employment provided, activities directed at combating the social problems referred to, so as to help reduce their deleterious effects and progressively improve community stability.
7. To progressively eliminate the imbalances in incomes referred to in (4).
8. To maximise the capacity of Aboriginal communities to determine the use of their
9. workforce.

### **Guidelines**

9. Community Development Employment Grants will be applied to provide employment to unemployed members of an Aboriginal community and will be confined to Aboriginals living in remote areas or as separate communities where there is high unemployment and inadequate job opportunities and where the projects have been specifically requested by a community.
10. Grants will be paid to Aboriginal community councils but where appropriate may be paid direct to clan groups.
11. Grants to individual communities should not exceed the total entitlement of individual members to unemployment benefits as determined by the Department of Aboriginal Affairs in consultation with the Department of Social Security.
12. Specific grants may be made for the purchase of materials and equipment required for the implementation of a particular project.
13. The type of employment to be undertaken will be agreed between the individual communities and the Department of Aboriginal Affairs. Projects may include: economic ventures, town management activities, social advancement and environment improvement.
14. Each community will be encouraged to establish its own method of remuneration for its members who participate in the project provided that:
  - all unemployed community members eligible to apply for unemployment benefits will be given the opportunity to participate; and

- each participating community member, provided he contributes the required minimum hours or satisfies other minimum criteria determined by the community, will be guaranteed a minimum income approximating his normal unemployment benefit entitlement.
15. In assisting communities to determine methods of remuneration for individual members, the Department of Aboriginal Affairs will encourage communities to adopt co-operative and/or contract employment systems.
  16. The Department of Aboriginal Affairs will assist and advise communities in the implementation of the projects.
  17. It has been agreed that the Department of Employment and Industrial Relations will provide/arrange vocational training to assist Aboriginals to participate in the project or where desired to obtain normal employment outside the community.
  18. The community, when required shall satisfy the Department of Aboriginal Affairs that the project is being implemented in accordance with these guidelines.
  19. The community shall assist the Department of Aboriginal Affairs to evaluate and monitor the effectiveness of the project, including its social effectiveness.

Source: House of Representatives, Daily Hansard, 26 May 1977, p. 1922.

### **Appendix 3: Objectives and term of reference for 1997, independent review of the CDEP scheme**

The Review will have the following objectives:

- Having regard to previous reviews of the CDEP Scheme, make recommendations regarding its future development in order to maximise prospects for improved employment, economic, social and cultural outcomes for Indigenous Australians.
- Report on the operation and objectives of the Commonwealth's Community Development Employment Projects (CDEP) Scheme for Indigenous Australians paying particular attention to the effectiveness of CDEP in:
  - equipping participants to transfer to other employment; and
  - providing flexibility on industrial relations issues.

#### **The terms of reference of the review are:**

The Review should report on the effectiveness of CDEP and make recommendations for further improving the operational effectiveness of the Scheme. Specifically the Review should:

- 1 Assess, on the basis of previous reviews and work commissioned by the Review, the economic, community development and social outcomes achieved through CDEP both in quantitative and qualitative terms;
- 2 Make recommendations on operational matters including:
  - best practice models and strategies to facilitate the transition of participants to jobs outside of the CDEP Scheme. For example through:

- private and public sector labour markets;
  - private and public sector training programs;
  - accredited courses;
  - joint ventures; and
  - partnerships with private and public sectors.
- industrial relations issues and the emerging work relations environment.
- the administration of the scheme at the community organisation level including delivery mechanisms which might enhance the scheme's outcomes. In examining these issues, the review will need to take into account the following:
  - the funding formula including an analysis and an update of the Average Per Participant rate, using the new national data bank and distribution of recurrent and capital funding by Regional Councils.
  - analysis of actual administration costs at project level;
  - strategies for delivery of management training and support for CDEP;
  - organisations; and
  - monitoring and evaluation mechanisms.
- the entitlement and access to allowances of CDEP participants relative to DSS beneficiaries and low income earners.